COPY

FILED
97-31 JUL 2 1997
OFFICE OF THE CLERK

No.

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent*.

PATRICK BRUCE GORDON,

*Real Party in Interest*.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# PETITION FOR WRIT OF CERTIORARI

---

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General
WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Counsel for Petitioner

24pp

(CAPITAL CASE)

## QUESTIONS PRESENTED

Does 21 U.S.C. section 848 and *McFarland v. Scott* create a separate "post conviction proceeding" that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION OR JUDGMENT BELOW | 1 |
| STATEMENT OF JURISDICTION | 2 |
| CONSTITUTIONS, STATUTES OR REGULATIONS | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 6 |
| SUMMARY OF REASONS FOR GRANTING THE PETITION | 7 |
| CONCLUSION | 17 |

## TABLE OF AUTHORITIES


Page

**Cases**

*Arizonans for Official English v. Arizona*
U.S. , 117 S.Ct. 1055 (1997) 15

*Attwood v. Mendocino Coast Dist. Hosp.*
886 F.2d 241 (9th Cir. 1989) 12

*Christy v. Horn*
___ F.3d ___, 1997 W.L. 296402 (3rd Cir. 1997) 14

*Coleman v. Vasquez*
771 F.Supp. 300 (N.D.Cal. 1991) 13

*Deakins v. Monagan*
484 U.S. 193 (1988) 16

*FTC v. Dean Foods Co.*
384 U.S. 597 (1966) 9

*Gordon v. Vasquez*
859 F.Supp. 413 (E.D. 1994) 4, 11, 15

*Harris County Comm'rs Court v. Moore*
420 U.S. 77 (1975) 12

*Hill v. Lockhart*
992 F.2d 801 (8th Cir. 1993) 13, 15

*In re Blodgett*
502 U.S. 236 (1992) 16

## TABLE OF AUTHORITIES, CONT'D

*In re Clark*
21 Cal.Rptr.2d 509 (1993) 10, 15

*In re Joiner*
58 F.3d 143 (5th Cir. 1995) 8, 13

*In re Lindsey*
875 F.2d 1502 (11th Cir. 1989) 14, 15

*In re Parker*
49 F.3d 204 (6th Cir. 1995) 13

*McFarland v. Scott*
512 U.S. 849 (1994) passim

*McKinney v. Paskett*
753 F.Supp. 861 (D.Id. 1990) 13

*People v. Gordon*
270 Cal.Rptr. 451 (1990) 4, 10

*Rose v. Lundy*
455 U.S. 509 (1982) 6, 7, 11, 16

*Shaw v. Delo*
971 F.2d 181 (8th Cir. 1992) 13

*Steffen v. Tate*
39 F.3d 622 (6th Cir.1994) 13

*Sterling v. Scott*
57 F.3d 551 (5th Cir. 1995) 7, 13, 14

## TABLE OF AUTHORITIES, CONT'D

*Telecommunications Research & Action Center v. FCC*
750 F.2d 70 (D.C. 1984) 9

*Turner v. Johnson*
106 F.3d 1178 (5th Cir. 1997) 13

*United States ex rel. Whitehead v. Page*
914 F.Supp. 1541 (N.D. Ill. 1995) 13

*Wainwright v. Norris*
836 F.Supp. 619 (E.D. Ark. 1993) 13

**Statutes**

21 United States Code
§ 848(q)(9) passim
§ 848 passim
§ 848(q)(4)(B) 2, 14, 16
§ 848(q)(8) 2, 11
§ 848(q)(B) 3
§ 2251 3, 8, 12
§ 2254 passim

28 United States Code
§ 1254(1) 2
§ 1651 3
§ 2244(d)(1) 9
§ 2263 9

## TABLE OF AUTHORITIES, CONT'D

**Court Rules**

Rule 21 of the Federal
Rules of Appellate Procedure 3

**Other Authorities**

Anti-Drug Abuse Act of 1988 7

Antiterrorism and Effective Death Penalty Act 9

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

– No.

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioners*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent*.

PATRICK BRUCE GORDON,

*Real Party in Interest*.

---

Arthur Calderon, Warden of California State Prison at San Quentin, and Daniel E. Lungren, Attorney General of the State of California [hereinafter "The State"], respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case in which Patrick Bruce Gordon is the Real Party in Interest [hereinafter "Gordon"].

## OPINION OR JUDGMENT BELOW

The order and opinion denying the petition for writ of mandamus were filed on February 21, 1997. The order and opinion are reported at 107 F.3d 756 (9th Cir. 1997). The petition for rehearing was denied on April 16, 1997. The published amended order and opinion of the United States Court of Appeals for the Ninth Circuit

denying the petition for rehearing is not yet reported. Copies of both decisions are contained in the appendix to this petition for writ of certiorari.

## STATEMENT OF JURISDICTION

The State timely invokes the Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 16, 1997.

## CONSTITUTIONS, STATUTES OR REGULATIONS

21 U.S.C. section 848(q)(4)(B) provides:

> In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5),(6),(7),(8), and (9).

21 U.S.C. section 848(q)(8) provides:

> Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion by the defendant, each attorney so appointed shall represent the defendant throughout every subsequent state of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals,

> applications for writ of certiorari to the Supreme Court of the United States, and all available post conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

21 U.S.C section 848(q)(9) provided in pertinent part as follows:

> Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, . . . the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore . . . .[1/]

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to 21 U.S.C. section 848(q)(B) and 21 U.S.C. sections 2251 and 2254. The jurisdiction of the circuit court of appeals was invoked pursuant to 28 U.S.C. section 1651 and Rule 21 of the Federal Rules of Appellate Procedure.

On May 3, 1985, real party in interest PATRICK BRUCE GORDON was sentenced to death in California

---

1. This section has since been amended to limit the ex parte proceedings. The Ninth Circuit held in this case that the amendments did not apply to cases in which fee requests were filed before April 24, 1996. Without conceding its correctness, the State is not challenging that holding.

for the December 18, 1983, robbery-murder of William Camp Wiley.

On June 21, 1990, the California Supreme Court affirmed Gordon's death sentence. *People v. Gordon,* 270 Cal.Rptr. 451 (1990).

On July 5, 1991, Gordon filed a request in the district court for appointment of counsel pursuant to 21 U.S.C. section 848. Gordon had never filed a petition for writ of habeas corpus in state court. On December 31, 1991, and April 3, 1992, respectively, the district court appointed counsel and co-counsel for Gordon.

On October 23, 1992, Gordon filed a petition for writ of habeas corpus containing over 80 claims, of which approximately 60 were unexhausted.

On April 14, 1993, Gordon's federal court attorneys were appointed to represent Gordon in any state court habeas corpus proceeding.

On April 28, 1993, the California Supreme Court denied Gordon's request for investigative funds for state collateral proceedings.

On May 4, 1993, pursuant to local rule, the district court stayed the federal proceedings to allow Gordon to exhaust state remedies.

On June 28, 1993, Gordon raised the federal question in this case by invoking 21 U.S.C. section 848 to request investigative funds from the district court.

On June 27, 1994, and July 25, 1994, the district court found that it had jurisdiction to consider the investigative funds request even though Gordon's federal action had been stayed for purposes of exhaustion. *Gordon v. Vasquez,* 859 F.Supp. 413 (E.D. 1994). App. C.

On September 19, 1994, the state filed a petition for writ of mandamus with the Ninth Circuit Court of Appeals requesting that the two district court orders of June 27, 1994, and July 25, 1994, be vacated.

On November 15, 1994, the district court vacated its previous orders, struck the petition filed on October 23,

1992, and reactivated the federal action so that Gordon could ask for funds under 21 U.S.C. section 848 pursuant to *McFarland v. Scott,* 512 U.S. 849 (1994). App. D & E.

On November 30, 1994, petitioner filed an amended petition for writ of mandamus asking that the November 15, 1994, order be vacated.

On February 21, 1997, the Ninth Circuit filed an order and opinion denying the petition for writ of mandamus. App. B.

On April 16, 1997, the Ninth Circuit Court of Appeals filed an order and amended opinion denying the petition for writ of mandamus and holding that the district court had jurisdiction to grant 21 U.S.C. section 848(q)(9) request even though the district court had dismissed the petition for containing unexhausted claims. App. A at p. 11 & App. B.

## SUMMARY OF ARGUMENT

This Ninth Circuit case raises an important question about the meaning of the "post conviction proceeding" created by Congress in 21 U.S.C. section 848 for state capital defendants seeking habeas corpus relief under 21 U.S.C. section 2254. *McFarland v. Scott,* 512 U.S. 849 (1994). The Ninth Circuit Court of Appeals followed *Rose v. Lundy*, 455 U.S. 509 (1982) to hold that a so-called "mixed petition" (a petition containing unexhausted claims) must be dismissed. However, the Ninth Circuit also held that the dismissal of the petition does not mean that the "post conviction proceeding" under 21 U.S.C. section 848 has been dismissed. Thus, even though a petitioner has filed a mixed petition and that petition is dismissed, the petitioner may still secure investigative funding even while returning to state court to exhaust.

By proclaiming that a separate "post conviction proceeding" survives the dismissal of a mixed petition, the Ninth Circuit created a "two-tiered" habeas proceeding which permits federal courts to exercise jurisdiction over cases when the petitioners are in state court exhausting claims. It has overextended the law and logic of *McFarland* in which this Court held only that Congress intended section 848 to create a "post conviction proceeding" in the "preapplication" phase of a habeas corpus proceeding under 28 U.S.C. section 2254. Given the language of 21 U.S.C. section 848, this "Gordon" jurisdiction would extend to the appointment and payment of counsel for exclusively state court proceedings such as competency and clemency as well as the payment of reasonably necessary expenses, including staying state collateral proceedings if necessary.

The Ninth Circuit's opinion raises troubling questions of federalism since it permits federal courts to hover over state court proceedings by intruding and

interfering with those proceedings through the counsel appointment and fee request processes. The opinion also conflicts with the decisions of other circuits. An orderly and efficient review process requires a separation and clear demarcation between state and federal habeas proceedings. Since the Ninth Circuit's opinion misapplies *McFarland* to obliterate this distinction, review should be granted.

## SUMMARY OF REASONS FOR GRANTING THE PETITION

This case concerns the scope of the "post conviction proceeding arising under [28 U.S.C] section 2254" [hereinafter "section 2254"] created by 21 U.S.C. section 848 [hereinafter "section 848"]. This "awkwardly misplaced . . . statutory afterthought . . . ," contained within the Anti-Drug Abuse Act of 1988 in the Food and Drug Code provides for pre-petition appointment of counsel and investigative expenses for "post conviction proceedings" arising under 28 U.S.C. section 2254, the federal habeas corpus statute for review of state convictions. *Sterling v. Scott,* 57 F.3d 551, 557 (5th Cir. 1995). The Ninth Circuit has now held that the "post conviction proceeding" in 21 U.S.C. section 848 extends beyond the "preapplication phase" in a section 2254 proceeding into the "post-dismissed application phase."

In *McFarland v. Scott,* this Court held that the pre-petition filing of a request for appointment of counsel initiated a "post conviction" proceeding. In this case, the Ninth Circuit extended *McFarland* to hold that the subsequent dismissal of a mixed petition under *Rose v. Lundy* does not preclude a district court from still granting requests for investigative fees under 21 U.S.C. section 848(q)(9). Relying on *McFarland,* the intermediate appellate court held that the filing of a motion for appointment of counsel under section 848 creates a

separate "post conviction proceeding" that survives the dismissal of a mixed petition. App. A at 11.

Now, Ninth Circuit courts will continue to exercise jurisdiction over capital cases even though the habeas petitioners have returned to state court for exhaustion. These district courts will still have jurisdiction to authorize funds under section 848 even if the petitioner is in state court litigating and investigating claims for presentation to state courts. Such investigations could continue under the auspices of the "post conviction proceeding" in lieu of the petitioner returning immediately to state court to exhaust. Federal courts will be able to stay executions during that time or even while state collateral proceedings are pending under 28 U.S.C. section 2251.

Prior to the enactment of section 848, federal habeas corpus proceedings were traditionally initiated with the filing of an application or petition for writ of habeas corpus. *McFarland v. Scott,* 512 U.S. at 857 fn. 3. In *McFarland,* this Court held that the filing of a request for appointment of counsel initiated a "post conviction proceeding" under section 2254 prior to the filing of an actual petition. This Court construed section 848 as creating a right to appointed counsel prior to the filing of petition for writ of habeas corpus. In this Court's view, this interpretation was necessary to give practical meaning to section 848's provisions for appointment of counsel and investigative services. *Id.* at 855.

However, this Court in *McFarland* did not reach the issue of whether this "post conviction proceeding" continued once an actual petition had been filed. *In re Joiner,* 58 F.3d 143, 144 (5th Cir. 1995). Nor did this Court construe section 848 as creating a basis for jurisdiction separate from the habeas corpus petition under section 2254.[2/]

---

2. In that sense, the "post conviction proceeding" should be no

Yet, the Ninth Circuit has now elongated *McFarland* to hold that a "post conviction proceeding" continues in existence in district court even after the dismissal of a mixed petition. The section 848 "post-conviction proceeding" does not merge with the section 2254 proceeds when the application is filed, but continues on a separate track.

In Gordon's case, the court held that a district court could still grant a request for funds under 21 U.S.C. section 848(q)(9) despite the dismissal of a petition containing unexhausted state claims. Thus, the Ninth Circuit took the limited "pre-application post conviction proceeding" recognized by this court in *McFarland* and expanded it into an overarching, ongoing federal court proceeding independent of any proceedings related to a pending state or federal habeas corpus petition. In doing so, the Ninth Circuit explained that district courts may disburse federal funds under section 848(q)(9) after a

---

different than a proceeding under the All Writs Act. That Act does not create any separate independent jurisdiction. *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 77 (D.C. 1984); *see also FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966). In fact, this Court held in *McFarland* that section 848 refers to the "precise 'habeas corpus proceeding'" discussed in 28 U.S.C. section 2251, which applies to habeas corpus proceedings under section 2254. *McFarland v. Scott,* 512 U.S. at 858. This Court went out of its way to explain that section 848 granted a right to counsel and services in "any [federal] post conviction proceeding." *Id.* at 854 [brackets in original]. Furthermore, this Court noted that the purpose of the section 848 appointment was a critical part of the "preapplication phase of a habeas corpus proceeding. . . ." *Id.* at 855. In the recently enacted Antiterrorism and Effective Death Penalty Act, Congress reiterated this difference by specifically providing that the new period of limitations for commencing habeas corpus proceedings would be based on the filing of an application for a writ of habeas corpus, not the filing of a request for appointment of counsel. 28 U.S.C. §§ 2244(d)(1), 2263 (amd. 4/24/96); Pub. L. 104-132, tit. I, §§ 101, 106, 107(a); 110 Stat. 1217, 1220, 1223 (1996).

petition has been dismissed and has not even limited the power of a federal court to continue disbursing such funds even if a petitioner is exhausting claims in state court.

Notwithstanding some procedural maneuvering by the district court, the actual history of Gordon's case is simple. Gordon was sentenced to death on May 3, 1985. He was represented by counsel on appeal. *People v. Gordon,* 270 Cal.Rptr. at 455. Although a state habeas corpus process was available in 1990 and Patrick Gordon's attorney, the California State Public Defender, considered filing a state habeas corpus petition -- Gordon did not pursue a state collateral remedy. *In re Clark,* 21 Cal.Rptr.2d 509, 520, 542, 550-551 (1993). Instead, after finishing direct review, Gordon filed a request for appointment of new counsel in district court. A request for investigative funds was denied on the ground that the funds request related only to unexhausted claims. In 1992, Gordon still filed a petition containing 80 claims including 60 unexhausted claims. Rather than dismissing the petition, the district court used a local rule to stay the federal case while Gordon returned to state court to exhaust. In preparation for exhaustion, Gordon secured appointment of his new counsel in state court, but his request for investigative funds was denied by the state court.

Gordon then made the move which lead to this current litigation. Even though the district court had "stayed" the federal proceeding, Gordon returned to federal court in 1993 and requested funds under section 848 to finance his investigation leading to the filing of his state court habeas corpus petition. Ultimately, in 1994, the district court held that even though the petition contained unexhausted claims which petitioner was going to litigate in state court, the district court had the power to authorize funds under section 848 since the federal proceedings had only been stayed, rather than dismissed.

*Gordon v. Vasquez,* 859 F. Supp 413 (E.D.Cal. 1994). App. C. The State commenced mandamus proceedings.[3/]

Ultimately, the Ninth Circuit Court of Appeals correctly held that the district court should have dismissed the petition under *Rose v. Lundy,* rather than simply staying the federal proceedings. Thus the appeals court invalidated the local district court rule that authorized a stay of proceedings rather than dismissal of the petition for exhaustion.

However, the Ninth Circuit then went on to hold that under section 848(q)(9) and this Court's decision in *McFarland* the district court could still entertain a fees request since the request was authorized in any "post conviction proceeding" under section 848 and because a "post conviction proceeding" had been commenced in this case by counsel's request for appointment of counsel. In other words, a "post conviction proceeding" under section 848 survived the dismissal of a mixed habeas corpus petition. The district court still had jurisdiction to entertain and grant investigative expenses requests even though further proceedings in the case would be occurring in state court. 21 U.S.C. §§ 848(q)(8), 848(q)(9). The district court's decision authorizing a fees request even during the pendency of state court proceedings remained intact. *Gordon v. Vasquez, supra*. App. C at pp. 10-12.[4/]

---

3. The district court then tried to moot the writ litigation by "striking" the petition and reactivating the federal proceedings even though Gordon had not exhausted his claims. The district court used the pretext that *McFarland v. Scott* now permitted the court to turn the clock back to 1992 to permit Gordon to investigate unexhausted claims. App. D & E. The State amended its mandamus petition to challenge this maneuver. The Ninth Circuit's decision did not need to reach this issue once it found that dismissal of a mixed petition did not end the "post conviction proceeding."

4. Thus, the district court has more power than it would have if it simply stayed a proceeding under the abstention doctrine.

The Ninth Circuit's creation of a parallel post conviction proceeding overshadowing the proceedings for a habeas corpus petition and hovering over state court exhaustion proceedings is unsupported by any authority and is contrary to the principles of comity and federalism underlying our concurrent federal-state court system. It raises the spectre of duelling, conflicting jurisdictional battles between the state and federal court system. This opinion conflicts with every other circuit court interpretation of *McFarland* and section 848. The Ninth Circuit opinion transforms the federal collateral process from a procedure which centers on the application for a writ of habeas corpus into a procedure in which the petition is simply a procedural event in an ongoing federal funding proceeding.

*McFarland* did not compel this result. In that case, this Court confronted last-minute "execution eve" litigation in which a defendant had not had the opportunity to pursue state collateral relief with a lawyer. *McFarland* recognized a "preapplication" statutory right to appointment of counsel and reasonably necessary funding in a case in which a petitioner was unrepresented in state court and did not have the opportunity to pursue state collateral relief. *McFarland* created a concomitant right for a district court to stay state court proceedings in this process under 28 U.S.C. section 2251. This Court explained that an attorney and other services "may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified." *McFarland v. Scott,* 512 U.S. at 855. Nothing in *McFarland* indicates that Congress intended the "preapplication" "post conviction proceeds" to continue beyond the filing of the petition.

---

*Compare, Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 88-89, fn.14 (1975); *Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 243 (9th Cir. 1989).

In this case, however, Gordon had a lawyer on state appeal who was available to pursue state collateral relief, but did not. He had counsel appointed in district court who had been able to research and identify issues resulting in the filing of a petition containing 80 claims which had to be dismissed because of 60 unexhausted claims. Yet, according to the Ninth Circuit, that dismissal does not end the federal action. The Ninth Circuit, no matter how it characterizes the procedural posture of Gordon's case, has now recognized a "post dismissed application" proceeding under sections 848 and 2254. It has extended the *McFarland* "post conviction proceeding" beyond what was envisioned by either this Court or by the Congress. *See also Sterling v. Scott,* 57 F.3d at 457.

Gordon conflicts with every other decision that has considered the scope of the "post conviction proceeding" created by section 848 and *McFarland*. *Turner v. Johnson,* 106 F.3d 1178, 1182-1183 fn.8 (5th Cir. 1997) (*McFarland* "concerned only with the period of time between the habeas petitioner's motion for appointment of counsel and the filing of the initial petition . . . ."); *Sterling v. Scott,* 57 F.3d 451, 457 (section 848 does not create a right to appointed counsel in state proceedings nor to a right to have a federal petition held in abeyance during exhaustion since section 848 should not be invoked until completion of state court processes); *In re Joiner, 58 F.3d* at 44; *Steffen v. Tate*, 39 F.3d 622, 624 (6th Cir.1994); *In re Parker*, 49 F.3d 204, 209 (6th Cir. 1995) (distinguishing *McFarland* and rejecting indefinite stays of execution); *Shaw v. Delo*, 971 F.2d 181, 187-188 (8th Cir. 1992); *Hill v. Lockhart,* 992 F.2d 801 (8th Cir. 1993); *Wainwright v. Norris,* 836 F.Supp. 619, 621 (E.D. Ark. 1993); *McKinney v. Paskett,* 753 F.Supp. 861 (D.Id. 1990); *Coleman v. Vasquez,* 771 F.Supp. 300, 304 fn. 5 (N.D.Cal. 1991); *United States ex rel. Whitehead v. Page,* 914 F.Supp. 1541 (N.D. Ill. 1995) and cases cited therein; *In re Lindsey,* 875 F.2d 1502 (11th Cir. 1989); *see also Christy v. Horn,*

___ F.3d ___, 1997 W.L. 296402 (3rd Cir. 1997) (f. 6/5/97) (court must dismiss mixed petition rather than hold petition in abeyance unless execution is "imminent").

Thus, no other court has held that the section 848 appointment of counsel forges a federal action distinct from the habeas corpus action. By making this distinction, the Ninth Circuit has failed to "observe the principles of federalism." *Sterling v. Scott,* 57 F.3d at 457. The survival of the section 848 action permits intrusion of the federal courts into the state court process. "It is not too difficult to see that the hand of the federal court may well find its way further into state court proceedings and the independence of state courts unnecessarily interfered with and compromised thereby." *Ibid.* (describing section 848(q)(4)(B) as a "statutory stepchild").

The implications of this new and indefinite "post conviction proceeding" in which the district court appoints counsel and disburses federal funds even when no petition is pending in federal court are serious. The potential for district court interference may be gleaned from the original district court opinion in this case. That district court found that even though Gordon filed a "mixed petition" and his federal proceedings were stayed, the court still had jurisdiction under section 848 to entertain requests for investigative funds. It found jurisdiction to consider the fees request even though Gordon had never pursued state collateral remedies prior to initiating his post conviction proceeding in district court. The district court also explained that it retained jurisdiction in the case "to protect a litigant's federal rights [under section 848] during the pendency of state court proceedings." App. C at p. 11. Thus indicating that the court could intervene in or stay state court processes if it so deemed necessary and even if no petition was pending before it.

Ominously, the district court also held that the plain meaning of section 848 directed the appointment and payment of counsel for state competency and

clemency proceedings by the district court even though those proceedings ordinarily occur in state court. The district court interpreted section 848 as commanding "that appointed counsel represent the defendant in all post-petition proceedings without regard to forum." *Gordon v. Vasquez,* 859 F.Supp. at 418 citing *Hill v. Lockhart,* 992 F.2d at 803; *cf. In re Lindsey,* 875 F.2d 1502, 1506. App. C at pp. 17-18. None of these powers or eventualities are affected by the Ninth Circuit's holding.[5]

The Ninth Circuit's concept of a free-floating post conviction proceeding untethered to any cognizable claim for relief will only contribute to increased confusion and chaos in the litigation of capital cases. Petitioners such as Gordon, dissatisfied with the ongoing processes in state courts, will retreat to a concurrent district court haven for refuge. This side-by-side state-federal litigation will cause further delay and obstruction of state processes. Inevitably, state courts, state executives, and federal courts will be drawn into conflicts that will only hamper the states' ability to enforce their lawful judgments.

Gordon's case implicates this Court's role as moderator of conflicts between our state and federal court systems. Recently, this Court reiterated dual goals of promoting a "cooperative judicial federalism" among the federal and state courts and of reducing the potential waste of "time, energy, and resources" when these concurrent systems collide. *Arizonans for Official English v. Arizona,* ___ U.S. __, 117 S.Ct. 1055, 1073 (1997). "Comity" between the state and federal courts precludes federal courts from "hovering" over state courts. *Cf. Deakins v. Monagan, 484 U.S. 193, 203 (1988).* When it comes to the unique procedure by which federal courts review state criminal convictions in habeas corpus, both

---

5. California also provides for the appointment of state counsel in clemency and competency proceedings. *In re Clark,* 21 Cal.Rptr.2d at 550-551.

this Court and the Congress have tried to minimize "unnecessary conflicts" and "friction" between the co-equal state and federal courts. *Rose v. Lundy,* 455 U.S. at 513-518; *In re Blodgett,* 502 U.S. 236, 239-240 (1992). The Ninth Circuit's Gordon decision sets federal courts and state systems on a collision course.

The section 848 tail now wags the section 2254 dog. The Ninth Circuit has misinterpreted *McFarland* and the congressional intent of section 848. This Court should grant certiorari and hold that the dismissal of a mixed petition also terminates the "post conviction proceeding under section 2254" authorized by section 848(q)(4)(b).

## CONCLUSION

For the foregoing reasons, the State requests that the petition for writ of certiorari be granted.

Dated: June 24, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General

WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

WAC:led

COPY

(2)

Supreme Court, U.S.
FILED

No. 97-31 JUL 2 1997

OFFICE OF THE CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1996

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent*.

PATRICK BRUCE GORDON,

*Real Party in Interest*.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# APPENDIX

---

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General
WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Counsel for Petitioner

38 pp

## TABLE OF APPENDICES


| Document | Appendix |
|---|---|
| United States Court of Appeals, Ninth Circuit Order - Amended Opinion | A |
| United States Court of Appeals, Ninth Circuit Opinion | B |
| United States District Court Eastern District of California Order (7/25/94) | C |
| United States District Court Eastern District of California Findings and Recommendations | D |
| United States District Court Eastern District of California Order (11/10/94) | E |

# APPENDIX "A"

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,<br>Petitioners,<br>v.<br><br>UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,<br>Respondent.<br><br>PATRICK BRUCE GORDON,<br>Real Party In Interest. | No. 94-70565<br><br>D.C. No. CV 91-882-LKK<br>ORDER<br><br>AMENDED OPINION |

Petition for Writ of Mandamus to the
United States District Court for the
Eastern District of California

Argued and Submitted
January 18, 1996--San Francisco, California

Filed February 21, 1997
Amended April 16, 1997

Before: Charles Wiggins, John T. Noonan, and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wiggins

## OPINION

WIGGINS, Circuit Judge:

### OVERVIEW

Arthur Calderon, warden of the California State Prison at San Quentin, and Daniel Lungren, attorney general of California, (hereinafter "the State") petition for writ of mandamus and move to stay the district court's orders relating to the availability of investigative and expert funds under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(9), for death row inmate Patrick Bruce Gordon, the real party in interest. The State requests that we exercise our supervisory mandamus authority to prohibit the district court from approving federal funds for Gordon under section 848(q)(9), where the funds would be used to investigate unexhausted claims that must be pursued in state court before they may be included in the federal habeas petition. We have jurisdiction under 28 U.S.C. § 1651.

We hold that the district court could properly consider a request for funds under 21 U.S.C. § 848(q)(9) even though no habeas petition was pending after November 15, 1994. Because the district court properly dismissed the mixed habeas petition on November 15, we find moot the State's contention that the earlier stay of the habeas proceedings precluded the district court from considering the defendant's request for section 848(q) fees. We therefore decline to issue the writ of mandamus.[1] Accordingly, we deny the State's emergency

---

1. *See Armster v. United States Dist. Court.*, 792 F.2d 1423, 1425 (9th Cir. 1986) (court may accept mandamus

motion to stay the district court's June 27, July 25, and November 15, 1994, orders, and the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief.

## FACTS AND PRIOR PROCEEDINGS

We begin with a detailed discussion of the facts and complicated procedural history of this case. On March 13, 1985, Patrick Bruce Gordon, the real party in interest, was sentenced to death by a California court upon his conviction for conspiracy, first degree murder, and robbery in conjunction with a special circumstance.[2] The California Supreme Court affirmed Gordon's conviction and sentence, and the United States Supreme Court denied Gordon's petition for writ of certiorari. *People v. Gordon,* 792 P.2d 251 (Cal. 1990), *cert. denied,* 499 U.S. 913 (1991).

Gordon did not file a habeas petition in state court. Instead, he filed a skeletal petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of California.[3] His execution was

---

jurisdiction, but deny the petition for writ in exercising its supervisory mandamus authority).

2. Gordon was sentenced to death for the first-degree murder of an armored car courier during a robbery of a store in Stockton, California on December 19, 1983. He drove the getaway car during commission of the robbery and murder.

3. In his two-page petition, Gordon states only that he is being held in violation of his constitutional rights and requests that the court (1) appoint counsel for him and (2) allow him to file an amended habeas petition after he

stayed and counsel was appointed for him. The matter was referred to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1)(B). On October 23, 1992, Gordon filed an amended habeas petition containing over eighty claims which challenged both his conviction and death sentence. Approximately sixty of those claims were unexhausted claims. Thereafter, Gordon's counsel moved for investigative and expert funds under 21 U.S.C. § 848(q)(9), which authorizes the district court to fund such services for indigent capital defendants. Because the amended habeas petition contained unexhausted claims, the magistrate judge denied the funding request and the district court stayed the federal habeas proceeding, pursuant to the Eastern District's Local Rule 191(h)(5), to allow Gordon to exhaust his state remedies.

Gordon's federally-appointed counsel applied to the California Supreme Court for appointment to pursue Gordon's state remedies. The state court appointed counsel, but denied Gordon's request for investigative and expert funds. Gordon reapplied to the federal district court for investigative and expert funds. The magistrate judge denied the request because the federal habeas proceeding was stayed. On July 29, 1993, the district court issued an order requiring Gordon and the State to file briefs addressing (1) whether section 848(q)(9) requires the federal district court to authorize funds for investigative services even though the case has been remanded to state court for exhaustion; (2) whether the state court has a due process duty to provide adequate investigative funds; and (3) whether the federal district court has the power to stay an execution until the state provides the funds. Thereafter, on June 27, 1994, the district court issued (1) an order striking the State's brief

---

obtains assistance of counsel.

regarding the applicability of section 848(q) (9) to Gordon's habeas action because section 848(q)(9) required that requests for funds should be conducted on an *ex parte* basis; and (2) a separate sealed order holding that the district court had jurisdiction to consider Gordon's funding request despite the stay of the federal action.

On the State's motion for a recommendation that the district court certify for interlocutory appeal the June 27 orders, the magistrate judge recommended, *inter alia,* that the district court vacate the unsealed June 27 order[4] and unseal the sealed June 27 order. The district court adopted the magistrate judge's recommendations in a published opinion. See *Gordon v. Vasquez,* 859 F. Supp. 413 (E.D. Cal. 1994) (hereinafter "July 25 order"). The district court held that section 848(q)(9) mandates the authorization of investigative funds upon a finding that a request is "reasonably necessary" for the representation of a federal death penalty habeas petitioner, notwithstanding the fact that the funds would be used for investigating unexhausted claims. *Id.* at 417.

In September 1994, the State filed a petition for writ of mandamus, seeking to compel the respondent district court to vacate the June 27 and July 25 orders. The State challenged the use of federal funds, authorized under section 848(q)(9), to pursue state remedies on unexhausted claims. In addition, the State challenged the district court's jurisdiction to authorize investigative funds while the federal proceeding was stayed. Two months

---

4. The magistrate judge concluded that while the amount and use of § 848(q)(9) funds must be considered on an *ex parte* basis, the fact that § 848(q)(9) funds are sought and a determination relative to such a request need not be held in confidence.

later, on November 15, 1994, the district court issued an unpublished order that changed the procedural posture of this case by (1) vacating the stay of the federal proceeding; (2) striking without prejudice Gordon's amended habeas petition; and (3) allowing Gordon to file another amended habeas petition. In effect, the district court returned the case back to its procedural posture before Gordon had alleged his unexhausted claims. The November 15 order also allowed Gordon to present a new request for investigative funds within thirty days of the order. On December 9, 1994, Gordon filed under seal an *ex parte* application for investigative funds. On July 24, 1996, the district court issued an amended order denying Gordon's application.[5]

In response to the district court's November 15 order, the State filed an amended petition for writ of mandamus on November 30, 1994. The amended petition requests this court to stay the district court's November 15 order pending resolution of this matter in addition to vacating the June 27 and July 25 orders named in the original petition for writ of mandamus. According to the State, the November 15 order condoned the use of section 848(q)(9) funds to investigate unexhausted potential claims, at least insofar as reasonably necessary to determine whether there was enough factual support for a claim to warrant bringing it before state court, or to determine whether the factual support was so thin that the attorney might omit it entirely from the federal petition. The State argues that the November 15 order allows the prisoner to seek federal funds to develop claims that would otherwise necessarily be presented to the state court first, thereby creating an incentive for prisoners to start the habeas process in

---

5. The order superceded its July 11, 1996, order addressing the same issue.

federal court *before* exhausting their claims in state court to obtain access to federal investigative funds. On December 13, 1994, the State filed an emergency motion to stay all three district court orders.

The State contends in its petitions for writ of mandamus and emergency motion that section 848(q) does not authorize the use of federal funds to pursue state remedies on unexhausted claims. The State believes that the authorization of federal funds for such use is illegal and, therefore, seeks a writ of mandamus to prevent this occurrence.

## DISCUSSION

We have jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to review the district court's orders because this case presents a "question of law of major importance to the administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982) ("[T]he purpose of our review . . . is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner."), *judgment aff'd sub nom. by an equally divided Court, Arizona v. United States Dist. Court,* 459 U.S. 1191 (1983).

The State challenges the district court's determination that 21 U.S.C. § 848(q)(9)[6] provides investigative fees to

---

6. Section 848(q)(9) provides in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues

a habeas petitioner even after the habeas petition is stayed to enable the petitioner to exhaust his state claims. Although the State expressly asserts that it challenges only the district court's actions after the stay of the federal action, and does not challenge the stay of the federal proceeding,[7] the State nonetheless appears to argue that the district court erred in staying rather than dismissing the federal action upon the filing of the amended habeas petition. For that reason, and because of certain language in the district court's published July 25 order, we address this argument as well.

[1] We first hold that the district court erroneously stated in its July 25 order that dismissal of mixed habeas petitions, as required by *Rose v. Lundy,* 455 U.S. 509, 513-520, 102 S. Ct. 1198, 1200-04, 71 L. Ed. 2d 379 (1982), "is not the rule in the Ninth Circuit." Because Gordon's amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal petition was required. See *Coleman v. Thompson,* 501 U.S. 722, 731 (1991) ("This Court has long held that a state

---

> relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore.

21 U.S.C. § 848(q)(9).

7. The State writes in the original petition for writ of mandamus that it is "not even challenging the stay of the proceedings. Rather, [the State] herein challenges only the respondent court's opinion that by issuing this stay of proceedings that the federal court also has jurisdiction to issue other orders including granting investigative fee requests."

prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.") (citing *Rose,* 455 U.S. at 513-20); *see also James v. Borg,* 24 F.3d 20, 24 (9th Cir.) ("In general, a habeas petition should be dismissed if a petitioner has failed to exhaust state remedies as to even one claim."), *cert. denied,* 115 S. Ct. 333 (1994).[8]

The district court reached its erroneous conclusion by relying on our opinion in *Neuschafer v. Whitley,* 860 F.2d 1470 (9th Cir. 1988), *cert. denied,* 493 U.S. 906 (1989), as support for staying the federal habeas action instead of dismissing the petition pursuant to *Rose*. *Gordon,* 859 F. Supp. at 417. Specifically, it relied on the following passage from *Neuschafer*:

> When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies.

---

8. The presence of unexhausted claims is not, however, a jurisdictional bar for appellate review of the habeas petition. See *Granberry v. Greer,* 481 U.S. 129, 131 (1987) ("[F]ailure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application" where state failed to raise exhaustion defense in the district court) (citations omitted); *see also Acosta-Huerta v. Estelle,* 7 F.3d 139, 143 (9th Cir. 1993) (denying unexhausted claim that did not arise from federal law to reach the merits of petitioner's Sixth Amendment claim).

*Id.* (quoting *Neuschafer,* 860 F.2d at 1472 n.1). In *Neuschafer,* we determined under what circumstance a successive habeas petition constitutes an abuse of the writ. 860 F.2d at 1474.

Unlike *Rose, Neuschafer* did not involve a mixed habeas petition. *Neuschafer* addressed when a federal habeas action must be completed in one proceeding, finding specifically that the failure to raise in a prior petition an unexhausted claim because it would be barred by *Rose* precludes a finding that the prisoner deliberately withheld that claim from his first petition and thereby abused the writ by raising that claim in a second habeas petition once the claim has been exhausted. *Id.* (citing *Tannehill v. Fitzharris,* 451 F.2d 1322, 1324 (9th Cir. 1971)).[9] *Rose,* in contrast, focused on protecting the state courts' role in enforcement of federal law and preventing disruption of state judicial proceedings. *Rose*, 455 U.S. at 518.[10]

---

9. Subsequently, the Supreme Court's decision in *McClesky v. Zant,* held that the abuse of the writ is not limited to deliberate abandonment, but also includes instances of inexcusable neglect. *McClesky,* 499 U.S. 467, 489-90 (1990). We need not address here what effect *McClesky* has on *Neuschafer* because *Neuschafer* is in any event not relevant to the facts in this case.

10. It is important to distinguish that we are not dealing with the situation where there is a habeas petition filed and the prisoner then merely contemplates amending the habeas petition by adding unexhausted claims. *Cf. Fetterly,* 997 F.2d at 1302 (affirming stay of federal action to allow habeas petitioner to exhaust claims in state court *prior* to amending federal habeas petition).

[2] The district court effectively corrected this error in its November 15 order when it dismissed Gordon's habeas petition without prejudice. Because the district court vacated the stay on the habeas petition and dismissed it, the State presently cannot object that the stay precluded the district court from entertaining a request for fees under section 848(q)(9). To ensure the situation will not recur, we feel compelled to state explicitly the error in the July 25 order. This need arises because the district court did not vacate that part of the order, but rather it simply acted without regard to its previous conclusion that the stay of a mixed petition was permissible. Accordingly, we vacate that part (II. B) of the July 25 order discussing *Rose*.

[3] Despite our conclusion that the filing of a mixed habeas petition required dismissal, we do not believe that the petition for mandamus should be granted. "Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances." *Armster,* 792 F.2d at 1431 (citation omitted). We do not find that the district court's stay warrants issuance of the writ. We are confident that the district court will act consistently with this opinion, as indeed it has since it issued the November 15 order.

[4] We further hold that the State lacks standing to challenge the fees request under section 848(q)(9). The district court must determine whether fees are appropriate in an *ex parte* proceeding.[11] The general rule is

---

11. The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amends § 848(q)(9) so that the proceeding is not ex parte. We have held that the AEDPA's amendments to Chapter 153 of Title 28 of the United States Code do not apply to cases filed in federal court before the Act became effective on

well-settled that persons who are not parties before the district court may not appeal that court's order or judgment except in extraordinary circumstances. *In re Proceedings Before Fed. Grand Jury,* 643 F.2d 641, 643 (9th Cir. 1981) (dismissing appeal for lack of standing). While an appeal by a state may be the only avenue to review an award of section 848(q) fees, *cf. Bank of Am. v. M/V Exec.,* 797 F.2d 772 (9th Cir. 1986) (noting equity favors hearing appeal from only party who could object to issue), section 848(q)(9) contemplated that no party but the prisoner would participate in the *ex parte* proceeding. Thus, the State has no standing to petition this court to preclude the district court from considering a § 848(q) fee request in an ex parte proceeding.

[5] Moreover, we are not required to order sua sponte that the district court must deny the section 848(q)(9) fees request simply because we uphold the district court's dismissal of the mixed petition without prejudice. Under *McFarland v. Scott,* 512 U.S. 849, _____, 114 S. Ct. 2568, 2572 (1994), the district court may consider a section 848(q) fees request even when a habeas petition is not presently pending before the federal

---

April 24, 1996. *Jeffries v. Wood,* 103 F.3d 827, 827 (9th Cir. 1996) (*en banc*). Similarly, we believe that the amendment to section 848(q)(9) does not apply to section 848(q)(9) fees requests filed before that date. To hold otherwise would be to create retroactively a new right of a State: standing to challenge federal fees awards to certain state prisoners; it would also impermissibly impair a right Gordon had when he "acted," making the fee request: to avoid state interference with or knowledge of the details of his request. *Cf. Landgraf v. USI Film Products,* 511 U.S. 244, _____, 114 S. Ct. 1483, 1502 n.29 & 1505-06 (1994) (noting that new rule should not retroactively impact par- ties' rights).

courts. This request is authorized in "any post conviction proceeding" under the federal habeas corpus statutes, to be considered in accordance with section 848(q)(5)-(9). 21 U.S.C. § 848(q)(4)(B). The Court held that a "post conviction proceeding" within the meaning of section 848(q)(4)(B) begins upon the filing of the defendant's motion requesting assistance of counsel for his federal habeas proceeding. *Id.* at 2572-73. The district court may thus consider whether granting a fees request will assist the defendant in preparing for his federal habeas efforts. The district court is not required to grant the application, however. See *Sterling v. Scott,* 57 F.3d 451, 457-58 (5th Cir. 1995) (affirming decision that section 848(q)(9) fees request did not survive dismissal of mixed petition), *cert. denied,* 116 S. Ct. 715 (1996).

## CONCLUSION

For the foregoing reasons, we DENY the amended petition for writ of mandamus. We DENY the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief and deny the State's emergency motion to stay the district court's June 27, July 25, and November 15, 1994, orders.

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent,*

PATRICK BRUCE GORDON,

*Real Party In Interest.*

No. 94-70565

D.C. No. CV-91-882-LKK

OPINION

Petition for Writ of Mandamus to the United States District Court for the Eastern District of California

Argued and Submitted January 18, 1996—San Francisco, California

Filed February 21, 1997

Before: Charles Wiggins, John T. Noonan, and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wiggins

## SUMMARY

### Criminal Law and Procedure/Habeas Corpus

The court of appeals denied a petition for a writ of mandamus. The court held that a state lacks standing to challenge a capital habeas corpus petitioner's request under the Anti-Drug Abuse Act for funds for the investigation of unexhausted state claims.

While under a sentence of death, real party in interest Patrick Gordon filed a federal habeas corpus petition containing over 80 claims, more than 60 of which had not been exhausted in state court. Gordon moved for funds under § 848(q)(9) of the Anti-Drug Abuse Act (ADAA) for investigative and expert fees. A magistrate judge (MJ) denied the request on the ground that there were unexhausted claims. The district court stayed the habeas proceeding to allow Gordon to exhaust his state remedies.

Gordon's federally appointed counsel applied to the California Supreme Court for appointment and for investigative and expert funds. The state court appointed counsel, but denied the requested funds. Gordon again applied to the district court for funds. The MJ denied the request on the ground that the habeas proceeding had been stayed.

On June 27, 1994, the district court struck the State of California's brief on issues relating to Gordon's entitlement to ADAA funds on the ground that § 848(q)(9) requires ex parte consideration of an application for them. The court also ruled that it retained jurisdiction to consider Gordon's request despite the earlier stay of the federal action.

When the State sought interlocutory appeal, the district court ruled on July 25, 1994 that § 848(q)(9) requires authorization of investigative funds on a finding that they are reasonably necessary for the representation of a federal death

penalty habeas petitioner, even if the funds are to be used for investigating unexhausted claims.

The district court issued an order on November 15, 1994 that vacated the stay, struck without prejudice Gordon's habeas petition, and allowed him to file another. This in effect returned the case to its procedural posture before Gordon alleged his unexhausted claims. The order also allowed Gordon to reapply for investigative funds. On July 25, 1996, the court denied Gordon's application for funds.

The State filed a mandamus petition, challenging and seeking a stay of the district court's orders of June 27, July 25, and November 15, 1994. The State contended that § 848(q)(9) does not authorize the use of federal funds to pursue state remedies on unexhausted claims.

[1] Because Gordon's petition contained unexhausted state claims, dismissal of the federal action was required. [2] The district court corrected this error in its November 15 order when it dismissed Gordon's petition without prejudice. Because the court vacated the stay and dismissed the petition, the State could not object that the stay precluded the district court from entertaining a request for fees under § 848(q)(9).

[3] Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances. The district court's stay did not warrant issuance of the writ.

[4] The State lacked standing to challenge the fees request. Persons who are not parties before the district court may not appeal that court's order or judgment except in extraordinary circumstances. While an appeal may be the only avenue to review an award of fees, § 848(q)(9) contemplates that no party but the prisoner will participate in ex parte proceedings. The State had no standing to petition the court of appeals to preclude the district court from considering a § 848(q)(9) fee request in an ex parte proceeding.

[5] The district court may entertain a § 848(q)(9) fee request even after it dismisses a mixed habeas petition without prejudice. Congress established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings.

## COUNSEL

Ward A. Campbell, Deputy Attorney General and William G. Prahl, Deputy Attorney General, Sacramento, California, for the petitioners.

James R. Kirby II, Segal & Kirby, Sacramento, California, for the real party in interest.

## OPINION

WIGGINS, Circuit Judge:

### OVERVIEW

Arthur Calderon, warden of the California State Prison at San Quentin, and Daniel Lungren, attorney general of California, (hereinafter "the State") petition for writ of mandamus and move to stay the district court's orders relating to the availability of investigative and expert funds under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(q)(9), for death row inmate Patrick Bruce Gordon, the real party in interest. The State requests that we exercise our supervisory mandamus authority to prohibit the district court from approving federal funds for Gordon under section 848(q)(9), where the funds would be used to investigate unexhausted claims that must be pursued in state court before they may be included in the federal habeas petition. We have jurisdiction under 28 U.S.C. § 1651.

We hold that the district court could properly consider a request for funds under 21 U.S.C. § 848(q)(9) even though no habeas petition was pending after November 15, 1994. Because the district court properly dismissed the mixed habeas petition on November 15, we find moot the State's contention that the earlier stay of the habeas proceedings precluded the district court from considering the defendant's request for section 848(q) fees. We therefore decline to issue the writ of mandamus.[1] Accordingly, we deny the State's emergency motion to stay the district court's June 27, July 25, and November 15, 1994, orders, and the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief.

## FACTS AND PRIOR PROCEEDINGS

We begin with a detailed discussion of the facts and complicated procedural history of this case. On March 13, 1985, Patrick Bruce Gordon, the real party in interest, was sentenced to death by a California court upon his conviction for conspiracy, first degree murder, and robbery in conjunction with a special circumstance.[2] The California Supreme Court affirmed Gordon's conviction and sentence, and the United States Supreme Court denied Gordon's petition for writ of certiorari. *People v. Gordon*, 792 P.2d 251 (Cal. 1990), *cert. denied*, 499 U.S. 913 (1991).

Gordon did not file a habeas petition in state court. Instead, he filed a skeletal petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern Dis-

[1] *See Armster v. United States Dist. Court.*, 792 F.2d 1423, 1425 (9th Cir. 1986) (court may accept mandamus jurisdiction, but deny the petition for writ in exercising its supervisory mandamus authority).

[2] Gordon was sentenced to death for the first-degree murder of an armored car courier during a robbery of a store in Stockton, California on December 19, 1983. He drove the getaway car during commission of the robbery and murder.

trict of California.[3] His execution was stayed and counsel was appointed for him. The matter was referred to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1)(B). On October 23, 1992, Gordon filed an amended habeas petition containing over eighty claims which challenged both his conviction and death sentence. Approximately sixty of those claims were unexhausted claims. Thereafter, Gordon's counsel moved for investigative and expert funds under 21 U.S.C. § 848(q)(9), which authorizes the district court to fund such services for indigent capital defendants. Because the amended habeas petition contained unexhausted claims, the magistrate judge denied the funding request and the district court stayed the federal habeas proceeding, pursuant to the Eastern District's Local Rule 191(h)(5), to allow Gordon to exhaust his state remedies.

Gordon's federally-appointed counsel applied to the California Supreme Court for appointment to pursue Gordon's state remedies. The state court appointed counsel, but denied Gordon's request for investigative and expert funds. Gordon reapplied to the federal district court for investigative and expert funds. The magistrate judge denied the request because the federal habeas proceeding was stayed. On July 29, 1993, the district court issued an order requiring Gordon and the State to file briefs addressing (1) whether section 848(q)(9) requires the federal district court to authorize funds for investigative services even though the case has been remanded to state court for exhaustion; (2) whether the state court has a due process duty to provide adequate investigative funds; and (3) whether the federal district court has the power to stay an execution until the state provides the funds. Thereafter, on June 27, 1994, the district court issued (1) an order striking the State's brief regarding the applicability of section 848(q)

[3]In his two-page petition, Gordon states only that he is being held in violation of his constitutional rights and requests that the court (1) appoint counsel for him and (2) allow him to file an amended habeas petition after he obtains assistance of counsel.

(9) to Gordon's habeas action because section 848(q)(9) required that requests for funds should be conducted on an *ex parte* basis; and (2) a separate sealed order holding that the district court had jurisdiction to consider Gordon's funding request despite the stay of the federal action.

On the State's motion for a recommendation that the district court certify for interlocutory appeal the June 27 orders, the magistrate judge recommended, *inter alia*, that the district court vacate the unsealed June 27 order[4] and unseal the sealed June 27 order. The district court adopted with the magistrate judge's recommendations in a published opinion. *See Gordon v. Vasquez*, 859 F. Supp. 413 (E.D. Cal. 1994) (hereinafter "July 25 order"). The district court held that section 848(q)(9) mandates the authorization of investigative funds upon a finding that a request is "reasonably necessary" for the representation of a federal death penalty habeas petitioner, notwithstanding the fact that the funds would be used for investigating unexhausted claims. *Id.* at 417.

In September 1994, the State filed a petition for writ of mandamus, seeking to compel the respondent district court to vacate the June 27 and July 25 orders. The State challenged the use of federal funds, authorized under section 848(q)(9), to pursue state remedies on unexhausted claims. In addition, the State challenged the district court's jurisdiction to authorize investigative funds while the federal proceeding was stayed.

Two months later, on November 15, 1994, the district court issued an unpublished order that changed the procedural posture of this case by (1) vacating the stay of the federal proceeding; (2) striking without prejudice Gordon's amended

[4]The magistrate judge concluded that while the amount and use of § 848(q)(9) funds must be considered on an *ex parte* basis, the fact that § 848(q)(9) funds are sought and a determination relative to such a request need not be held in confidence.

habeas petition; and (3) allowing Gordon to file another amended habeas petition. In effect, the district court returned the case back to its procedural posture before Gordon had alleged his unexhausted claims. The November 15 order also allowed Gordon to present a new request for investigative funds within thirty days of the order. On December 9, 1994, Gordon filed under seal an *ex parte* application for investigative funds. On July 24, 1996, the district court issued an amended order denying Gordon's application.[5]

In response to the district court's November 15 order, the State filed an amended petition for writ of mandamus on November 30, 1994. The amended petition requests this court to stay the district court's November 15 order pending resolution of this matter in addition to vacating the June 27 and July 25 orders named in the original petition for writ of mandamus. According to the State, the November 15 order condoned the use of section 848(q)(9) funds to investigate unexhausted potential claims, at least insofar as reasonably necessary to determine whether there was enough factual support for a claim to warrant bringing it before state court, or to determine whether the factual support was so thin that the attorney might omit it entirely from the federal petition. The State argues that the November 15 order allows the prisoner to seek federal funds to develop claims that would otherwise necessarily be presented to the state court first, thereby creating an incentive for prisoners to start the habeas process in federal court *before* exhausting their claims in state court to obtain access to federal investigative funds. On December 13, 1994, the State filed an emergency motion to stay all three district court orders.

The State contends in its petitions for writ of mandamus and emergency motion that section 848(q) does not authorize the use of federal funds to pursue state remedies on unex-

[5]The order superceded its July 11, 1996, order addressing the same issue.

hausted claims. The State believes that the authorization of federal funds for such use is illegal and, therefore, seeks a writ of mandamus to prevent this occurrence.

## DISCUSSION

We have jurisdiction under the All Writs Act, 28 U.S.C. § 1651, to review the district court's orders because this case presents a "question of law of major importance to the administration of the district courts." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1307 (9th Cir. 1982) ("[T]he purpose of our review . . . is to provide necessary guidance to the district courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner."), *judgment aff'd sub nom. by an equally divided Court, Arizona v. United States Dist. Court*, 459 U.S. 1191 (1983).

The State challenges the district court's determination that 21 U.S.C. § 848(q)(9)[6] provides investigative fees to a habeas petitioner even after the habeas petition is stayed to enable the petitioner to exhaust his state claims. Although the State expressly asserts that it challenges only the district court's actions after the stay of the federal action, and does not challenge the stay of the federal proceeding,[7] the State nonetheless appears to argue that the district court erred in staying rather

---

[6]Section 848(q)(9) provides in pertinent part:

> Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore.

21 U.S.C. § 848(q)(9).

[7]The State writes in the original petition for writ of mandamus that it is "not even challenging the stay of the proceedings. Rather, [the State] herein challenges only the respondent court's opinion that by issuing this stay of proceedings that the federal court also has jurisdiction to issue other orders including granting investigative fee requests."

than dismissing the federal action upon the filing of the amended habeas petition. For that reason, and because of certain language in the district court's published July 25 order, we address this argument as well.

[1] We first hold that the district court erroneously stated in its July 25 order that dismissal of mixed habeas petitions, as required by *Rose v. Lundy*, 455 U.S. 509, 513-520, 102 S. Ct. 1198, 1200-04, 71 L. Ed. 2d 379 (1982), "is not the rule in the Ninth Circuit." Because Gordon's amended habeas corpus petition undisputedly contained unexhausted state claims, dismissal of the federal action was required. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims.") (citing *Rose*, 455 U.S. at 513-20); *see also James v. Borg*, 24 F.3d 20, 24 (9th Cir.) ("In general, a habeas petition should be dismissed if a petitioner has failed to exhaust state remedies as to even one claim."), *cert. denied*, 115 S. Ct. 333 (1994).[8]

The district court reached its erroneous conclusion by relying on our opinion in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), *cert. denied*, 493 U.S. 906 (1989), as support for staying the federal habeas action instead of dismissing the action pursuant to *Rose*. *Gordon*, 859 F. Supp. at 417. Specifically, it relied on the following passage from *Neuschafer*:

---

[8]The presence of unexhausted claims is not, however, a jurisdictional bar for appellate review of the habeas petition. *See Granberry v. Greer*, 481 U.S. 129, 131 (1987) ("[F]ailure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application" where state failed to raise exhaustion defense in the district court) (citations omitted); *see also Acosta-Huerta v. Estelle*, 7 F.3d 139, 143 (9th Cir. 1993) (denying unexhausted claim that did not arise from federal law to reach the merits of petitioner's Sixth Amendment claim).

> When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies.

*Id.* (quoting *Neuschafer*, 860 F.2d at 1472 n.1). In *Neuschafer*, we determined under what circumstance a successive habeas petition constitutes an abuse of the writ. 860 F.2d at 1474.

Unlike *Rose*, *Neuschafer* did not involve a mixed habeas petition. *Neuschafer* addressed when a federal habeas action must be completed in one proceeding, finding specifically that the failure to raise in a prior petition an unexhausted claim because it would be barred by *Rose* precludes a finding that the prisoner deliberately withheld that claim from his first petition and thereby abused the writ by raising that claim in a second habeas petition once the claim has been exhausted. *Id.* (citing *Tannehill v. Fitzharris*, 451 F.2d 1322, 1324 (9th Cir. 1971)).[9] *Rose*, in contrast, focused on protecting the state courts' role in enforcement of federal law and preventing disruption of state judicial proceedings. *Rose*, 455 U.S. at 518.[10]

[2] The district court effectively corrected this error in its November 15 order when it dismissed Gordon's habeas petition without prejudice. Because the district court vacated the

---

[9]Subsequently, the Supreme Court's decision in *McClesky v. Zant*, held that the abuse of the writ is not limited to deliberate abandonment, but also includes instances of inexcusable neglect. *McClesky*, 499 U.S. 467, 489-90 (1990). We need not address here what effect *McClesky* has on *Neuschafer* because *Neuschafer* is in any event not relevant to the facts in this case.

[10]It is important to distinguish that we are not dealing with the situation where there is a habeas petition filed and the prisoner then merely contemplates amending the habeas petition by adding unexhausted claims. *Cf. Fetterly*, 997 F.2d at 1302 (affirming stay of federal action to allow habeas petitioner to exhaust claims in state court *prior* to amending federal habeas petition).

stay on the habeas petition and dismissed it, the State presently cannot object that the stay precluded the district court from entertaining a request for fees under section 848(q)(9). To ensure the situation will not recur, we feel compelled to state explicitly the error in the July 25 order. This need arises because the district court did not vacate that part of the order, but rather it simply acted without regard to its previous conclusion that the stay of a mixed petition was permissible. Accordingly, we vacate that part (II. B) of the July 25 order discussing *Rose*.

[3] Despite our conclusion that the filing of a mixed habeas petition required dismissal, we do not believe that the petition for mandamus should be granted. "Mandamus is a drastic remedy that should be invoked only in extraordinary circumstances." *Armster*, 792 F.2d at 1431 (citation omitted). We do not find that the district court's stay warrants issuance of the writ. We are confident that the district court will act consistently with this opinion, as indeed it has since it issued the November 15 order.

[4] We further hold that the State lacks standing to challenge the fees request under section 848(q)(9). The district court must determine whether fees are appropriate in an *ex parte* proceeding.[11] The general rule is well-settled that persons who are not parties before the district court may not appeal that court's order or judgment except in extraordinary circumstances. *In re Proceedings Before Fed. Grand Jury*, 643 F.2d 641, 643 (9th Cir. 1981) (dismissing appeal for lack of standing). While an appeal by a state may be the only avenue to review an award of section 848(q) fees, *cf. Bank of Am. v. M/V Exec.*, 797 F.2d 772 (9th Cir. 1986) (noting equity

[11]The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 stat. 1214, amends § 848(q)(9) so that the proceeding is not *ex parte*, but that amendment does not apply to petitions filed in federal court before the Act became effective on April 24, 1996. *Jeffries v. Wood*, No. 95-99003 (9th Cir. December 20, 1996).

favors hearing appeal from only party who could object to issue), section 848(q)(9) contemplated that no party but the prisoner would participate in the *ex parte* proceeding. Thus, the State has no standing to petition this court to preclude the district court from considering a § 848(q) fee request in an *ex parte* proceeding.

[5] Moreover, we note that under *McFarland v. Scott*, 512 U.S. 849, —, 114 S. Ct. 2568, 2572 (1994), the district court may entertain a section 848(q) fee request even after it dismisses a mixed habeas petition without prejudice. This request is authorized in "any post conviction proceeding" under the federal habeas corpus statutes, to be considered in accordance with section 848(q)(5)-(9). 21 U.S.C. § 848(q)(4)(B). *McFarland* states that "[i]n adopting § 848(q)(4)(B), Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas corpus proceedings." *McFarland*, 114 S. Ct. at 2572.

## CONCLUSION

For the foregoing reasons, we DENY the amended petition for writ of mandamus. We DENY the State's Requests for Judicial Notice and for Leave to File Supplemental Exhibit and Pleading to Reply Brief and deny the State's emergency motion to stay the district court's June 27, July 25, and November 15, 1994, orders.

# APPENDIX "C"

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,

Plaintiff,

v.

DANIEL VASQUEZ, etc., et al. ,

Defendants.

_____/

NO. CIV. S-91-822 LKK/PAN

ORDER

Petitioner, a state prisoner condemned to death, filed pro se a petition for habeas corpus. The matter was referred to a magistrate judge, see 28 U.S.C. § 636(b)(1), Local Rules 302(c)(17), 303, 304, who granted permission to proceed in forma pauperis, stayed the execution, and initiated the process of obtaining counsel for petitioner. See Local Rule 191(d),(h)(2).[1] In due course, counsel

1. Local Rule 191(d) provides for appointment of counsel in death penalty habeas cases, and 191(h)(2) provides for temporary stays of execution pending appointment of counsel. See n.7, infra.

were appointed to represent petitioner and, after filing an amended petition, they moved for investigative and expert funds. The magistrate judge could not determine whether petitioner's claims had been exhausted and apparently for that reason denied the request.

Petitioner's second request for investigative funds was also denied, this time specifically on the basis that the petition contained unexhausted claims. Shortly thereafter, the magistrate judge formally found that the petition contained unexhausted claims and recommended that these proceedings be stayed pursuant to Local Rule 191(h)(5).[2] The recommendation relative to a stay was adopted by this court.

---

2. That rule provides: "If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After the state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims."

Petitioner, through his federally appointed attorneys, then applied to the California Supreme Court for appointment to pursue his state remedies and requested funds from that court to investigate potential habeas issues. Although counsel were appointed, the request for funds was denied. Thereupon counsel for petitioner reapplied to this court for funds for investigation. The magistrate judge summarily denied the request, stating:

> Petitioner has requested funds to investigate habeas corpus issues. This proceeding is presently stayed pending the completion of proceedings in the California Supreme Court. E.D. Cal., L.R. 191(h)(5); Order May 5, 1993. Accordingly, it is ORDERED that petitioner's request for investigative funds, filed June 28, 1993, is denied.

Order filed June 29, 1993.

Petitioner then sought reconsideration from this court, arguing that the magistrate judge's order was contrary to law. He contends that 21 U.S.C. § 848(q) mandates authorization of investigative funds upon a finding that a request is reasonably necessary for the

representation of federal death penalty habeas petitioners, notwithstanding the fact that the funds are for the express purpose of investigating facts on unexhausted claims to be presented to a state court.

This court ordered further briefing on the issue from both petitioner and the Attorney General of the State of California. Thereafter, I concluded that the order directed to the Attorney General was inappropriate since, under the statute, consideration of the request for investigative fees is an *ex parte* proceeding, which has been interpreted to mean an *in camera* proceeding. See 21 U.S.C. § 848(q)(9); Lawson v. Dixon, 3 F.3d 743, 751 (4th Cir. 1993), cert. denied, 114 S. Ct. 1208 (1994) (the plain language of 21 U.S.C. § 848(q)(9) providing for *ex parte* proceedings should not be overlooked simply because the court prefers all such motions to be handled on the record); Guide to Judiciary Policies and Procedures, Vol. VII, § 3.03 (*ex parte* application shall be heard *in*

*camera*).[3] But see McKinney v. Paskett, 753 F. Supp. 861, 863 (D. Idaho 1990) (petitioner required to show specifically the reason why services are necessary before being allowed an *ex parte* hearing).

Because I had concluded that the State was not an interested party, I ordered its briefing and its appearance relative to the Motion to Reconsider stricken. For the same reason, the court's resolution of the issue was ordered sealed. The matter was then remanded to the magistrate judge for further proceedings consistent with the court's sealed opinion.

Upon return to the magistrate judge, the State moved, inter alia, for a recommendation to this court for interlocutory appeal of the order striking the State's appearance and sealing the order disposing of the motion. Instead, the magistrate judge has fied Findings and

---

3. That section interprets an analogous section in the Criminal Justice Act. See In re Berger, 498 U.S. 233 (1991) (adopting guidelines as an interpretive aid).

Recommendations that the order be unsealed. He suggests that while the amount and use of funds must be considered *ex parte*, the fact that funds are sought and a determination relative to such a request need not be held in confidence. The court is satisfied that the distinction drawn by the magistrate judge is sensible. The court also notes that since its decision, the United States Supreme Court has issued its opinion in McFarland v. Scott, Director, Texas Dep't of Criminal Justice, Institutional Div., ___ S. Ct. ___, 62 U.S.L.W. 4713 (March 29, 1994), which indirectly sheds some light on the issues resolved by the court. Given the magistrate judge's recommendation and the decision in McFarland, the court will issue a new, public and slightly revised opinion in this matter.

## I

## STANDARD OF REVIEW

Because federal habeas proceedings are civil in nature,[4] the power of the district court to refer matters

---

4. Although the proceedings under which petitioner

for review by a magistrate judge is quite broad. Thus, a district court judge may designate a magistrate judge to hear and determine any nondispositive pretrial matters brought by a person seeking habeas relief, see 28 U.S.C. § 636(b)(1)(A); Local Rule 302(c)(17), and may refer dispositive motions for Findings and Recommendations. 28 U.S.C. § 636(b)(1)(B); Local Rule 302(a) & (c)(17). The standard employed by the district court in reviewing decisions of the magistrate judge depends upon the character of the underlying decision.

Non-dispositive pretrial motions referred to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) are reviewed under a clearly erroneous or contrary to law standard. See 28 U.S.C. § 636(b)(1)(A); Local Rule 303(f); United States v. Raddatz, 447 U.S. 667, 673 (1980).

---

was convicted in state court were criminal, it has long been established that habeas proceedings in federal court are civil in nature. Browder v. Director, Dep't of Corrections of Illinois, 434 U.S. 257, 269 (1978), citing Fisher v. Baker, 203 U.S. 174, 181 (1906).

On the other hand, a magistrate judge's determination concerning matters referred pursuant to 28 U.S.C. § 636(b)(1)(B) are for the most part reviewed de novo. Thus, the district court reviews de novo those portions of the proposed findings of fact to which objection has been made, 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982), and the magistrate's conclusions of law. Barilla v. Ervin, 886 F.2d 1514, 1518 (9th Cir. 1989), citing Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). The court may, however, assume the correctness of that portion of the proposed findings of fact to which no objection has been made and decide the motion on the applicable law. See United States v. Remsing, 874 F.2d 614,617 (9th Cir. 1989), citing Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979).[5]

---

5. The failure of a party to file objections does not relieve the district court of its obligation to give de novo

The court is not bound to adopt the magistrate's Findings and Recommendations; on the contrary, the court must exercise "sound judicial discretion" in making its own determination on the record. Raddatz, 447 U.S. at 675-76. The court may accept, reject, or modify, in whole or in part, the magistrate's findings or recommendations. 28 U.S.C. § 636(b)(1)(C); Remsing, 874 F.2d at 617.

In the matter at bar, petitioner seeks review of the magistrate judge's denial of fees, a non-dispositive pretrial order. Accordingly, the court employs the "clearly erroneous or contrary to law" standard of review. Where, as here, there are no disputed issues of fact and the question before the court is thus purely legal in nature, the standards of review under 28 U.S.C. § 636(b)(1)(A) and 28 U.S.C. § 636(b)(1)(C) converge. That is,

---

review of conclusions of law. Barilla, 886 F.2d at 1518.

under either standard of review, the court must determine whether the magistrate judge's conclusions of law are right or wrong.

## II

## THE RIGHT TO INVESTIGATIVE FUNDS

The magistrate judge's denial of the requested funds in this case relied exclusively on the fact that, pursuant to Local Rule 191(h)(5), a stay had issued to permit the exhaustion of state claims. Because of the cryptic nature of the order, it is unclear why the existence of a stay was viewed as precluding the granting of fees. Since the magistrate judge apparently did not consider the merits of the request, however, I must conclude that he thought it was improper to do so. As I explain below, two possible procedural and one possible substantive reason present themselves as justifications for such a conclusion. I consider each reason seriatim.

### A. Stays

One possible reason that the magistrate judge might conclude that he should not entertain a motion for investigative fees is because this court had entered the stay in effect at the time the motion was made. See Reynaga v. Cammisa, 971 F.2d 414, 416-17 (9th Cir. 1992) (magistrate judge lacked authority to enter stay in habeas case). If that was his reasoning, the magistrate judge, upon denying the motion, should have explained that it should be directed to the district court. Be that as it may, by virtue of the motion to reconsider the matter is now before this court subject to the court's further order, and thus the stay is no impediment to ordering fees if it is otherwise appropriate.

The purpose of issuing a stay of a federal court action rather than dismissing it in favor of state court proceedings is to protect a litigant's federal rights during the pendency of the state court proceedings. See, e.g., Attwood v. Mendocino Coast Dist. Hospital, 886 F.2d 241, 243 (9th Cir. 1989) (purpose of doctrine is to ensure

federal forum remains open if the state forum proves to be inadequate); and see Annotation, Stay of Action in Federal Court Until Determination of Similar Action Pending in State Court, 5 A.L.R. Fed. 10, 105 (1970) (same). In the matter at bar, the state court has refused to provide petitioner with the resources assertedly necessary to investigate his claim. Thus, if petitioner has a federal right to such resources, issuance of an order providing them is consistent with the reasons for retention of jurisdiction in the first place. See, e.g., Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (federal court stayed case in favor of state court proceeding on the condition that the Federal Rules relative to depositions were applied in state court).

**B. Unexhausted Claims**

A second possible reason suggested by the magistrate's refusal to grant fees prior to the stay may relate to the fact that the amended petition contains unexhausted claims. In Rose v. Lundy, 455 U.S. 509

(1982), the Supreme Court held that a district court must dismiss a petition for habeas corpus containing unexhausted claims. The magistrate judge may have thought that by virtue of Rose, he was without power to order investigative fees to pursue unexhausted claims on the premise that dismissal is required. That is not the rule in the Ninth Circuit. The circuit has held that:

> When a petitioner has not exhausted his state remedies before filing a federal habeas petition, a district court may hold the federal petition in abeyance, issue a stay of execution, and allow the petitioner an opportunity to exhaust his state remedies.

Neuschafer v. Whitley, 860 F.2d 1470, 1472 n.1 (9th Cir. 1988), cert. denied, 493 U.S. 906 (1989).[6] Local Rule

---

6. A plurality in Rose argued that when a petitioner elects to proceed on the exhausted claims, later petitions containing subsequently exhausted claims were subject to dismissal as an abuse of the writ. The Neuschafer court declined to follow this suggestion, believing that the circuit's earlier decision in Tannehill v. Fitzharris, 451 F.2d 1322 (9th Cir. 1971), precluded a finding that a petitioner who withholds unexhausted claims from the first federal petition does so deliberately, thereby abusing the writ. In a concurring opinion, Judge Alarcon suggested a procedure to prevent an "uncontrollable succession of

191(h), a product of the Ninth Circuit Death Penalty Task Force,[7] was an attempt to accommodate both Supreme Court and Ninth Circuit precedent, a duty of the Task Force, this court and the magistrate judge.[8]

In sum, where there are both exhausted and unexhausted claims tendered in a petition, the court may grant a stay pursuant to Local Rule 191(h) rather than dismissing the pending habeas case. It follows that since

---

petitions." Neuschafer, 860 F.2d at 1478 (Alarcon, J., concurring). That procedure was adopted by this district, en banc. See Ainsworth v. Vasquez, 759 F. Supp. 1467 (E.D. Cal. 1991).

7. In 1987, the Honorable James Browning, then Chief Judge of the Ninth Circuit, appointed a task force to consider the problems likely to be experienced within the circuit by virtue of the impending filing of a large number of death penalty habeas cases in the district courts. The task force was composed of representatives of the federal judiciary, various state attorney generals and defense counsel. Among its accomplishments, the task force produced a model local rule for the district courts. This district adopted that rule.

8. The district court and its adjunct magistrate judges, as subordinate entities bound by the rule of precedent, must conform their understanding of Supreme Court decisions to the interpretation of those decisions by the Ninth Circuit.

the court retains jurisdiction when a matter is stayed, see Burlington Northern Railroad Co. v. Crow Tribal Council, 940 F.2d 1239, 1245 n.3 (9th Cir. 1991) (federal courts may stay proceedings and retain jurisdiction pending exhaustion of tribal court remedies), the stay does not affect the court's jurisdiction to grant fee requests.

Having disposed of the two possible procedural bars, I now turn to the issue of whether the statute permits the granting of investigative fees relative to unexhausted claims.

C. **The Statute**

The issue before the court is whether 21 U.S.C. § 848(q) authorizes the district court to provide funds to a federal habeas petitioner to investigate unexhausted claims which are to be presented to a state court. The question is one of statutory interpretation. As with any such question, a district court must first determine whether there is binding authority construing the statute. Tello v. McMahon, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988). In

the matter at bar, neither the Supreme Court nor the Ninth Circuit has spoken to the issue at bar. Accordingly, the court must undertake its explication employing the traditional methods of statutory construction. Id.

Analysis commences with application of the plain meaning rule. If the meaning of the statute is clear, no further construction is required, id., for "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. __, 112 S. Ct. 1146, 1149 (1992); see also Church of Scientology v. United States Dep't of Justice, 612 F.2d 417, 421 (9th Cir. 1979) ("Congress does mean what it says and thus the statutory language is normally the best evidence of congressional intent"). If the language of the statute is ambiguous, resort may be had to textual and extrinsic aids of construction. Dodd v. John Hancock Mut. Life Ins. Co., 688 F. Supp. 564, 569 (E.D. Cal. 1988).

The statute at issue plainly commands federal appointment of attorneys for indigents seeking federal habeas corpus to review a state proceeding resulting in imposition of a sentence of death.[9] It also commands that appointed counsel represent the defendant in all post-petition proceedings without regard to forum.[10] Finally, it just as plainly commands the court to pay for support services, including investigative services, which are

---

9. "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)." 21 U.S.C. § 848(q)(4)(B).

10. "[E]ach attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications[] for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." 21 U.S.C. § 848(q)(8).

reasonably necessary for the adequate representation of the defendant.[11]

The statute's plain meaning concerning the payment of fees without reference to the forum is made clear by the congressional directive that federally appointed counsel represent the defendant in competency and clemency matters, see 21 U.S.C. § 848(q)(8). Those proceedings ordinarily occur in state forums after the conclusion of the federal habeas case. See Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993) (the statute requires provision of attorneys for competency and clemency proceedings even though they are, frequently [] not commenced until state and federal post conviction relief have been denied").

---

11. "Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10)". 21 U.S.C. § 848(q)(9) (emphasis added).

The only source of even potential ambiguity derives from the use of the term "defendant" rather than "petitioner" in the pertinent statute. That usage might suggest that only those facing capital punishment by virtue of conviction in a federal court are entitled to investigative fees. That possibility is enhanced by the fact that subsections 1, 2, and 3 of section 848(q) address the appeal rights of those suffering the imposition of a death sentence after conviction in federal court. Nonetheless, the argument simply cannot lie. Included among those entitled to appointment of counsel under the statute is a "defendant" who "seek[s] to vacate or set aside a death sentence" by bringing a "proceeding under § 2254." 21 U.S.C. § 848(q)(4)(B). Section 2254, of course, refers to habeas petitions following state conviction. See also Lawson v. Dixon, 3 F.3d at 751 n.5 ("Congress clearly intended to create a counsel and expert-services guarantee in federal habeas review of state-imposed death sentences.").

Section 848(q)(4)(B) is clear and unambiguous. Such unambiguous language controls the court's interpretation, absent "a clearly expressed legislative intent to the contrary." Russello v. United States, 464 U.S. 16, 20 (1983). American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (unless Congress has clearly indicated that its intentions are contrary to the words it employed in the statute, the words of the statute are both the starting and ending point of the interpretation). I now turn to the question of whether Congress has expressed a contrary intention.

Section 848(q) of Title 21 was added to the code in 1988 as part of the Anti-Drug Abuse Act. There appear to have been no accompanying Senate or House reports. See 1988 U.S.C.C.A.N. 5937. Nor does there appear to be any other extra statutory expression of legislative intent. Under these circumstances, there simply is no clearly expressed legislative intent contrary to the statute's plain meaning.

Despite the statute's apparent command, at least four courts have opined that section 848(q)(8)'s provisions do not reach proceedings seeking to exhaust state habeas remedies after the filing of a federal petition containing both exhausted and unexhausted claims. See In re Lindsey, 875 F.2d 1502, 1506 (11th Cir. 1989); Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993); Coleman v. Vasquez, 771 F. Supp. 300, 304 n.5 (N.D. Cal. 1991); McKinney v. Paskett, 753 F. Supp. at 865. Although four cases may initially appear impressive, examination suggests that they are weak precedent.

I begin by noting that the relevant discussions in all four cases are dicta. Lindsey purports to address the issue of the granting of fees where there are no viable federal claims;[12] in Hill, the issue resolved was that attorney's

---

12. In Lindsey, petitioner sought appointment of an attorney and psychiatrist on a petition which contained only one unexhausted claim. The court concluded that there was no "proceeding under 28 U.S.C. § 2254," and thus that 21 U.S.C. § 848(q) was inapplicable. In re Lindsey, 875 F.2d at 1506. The Supreme Court's recent

fees were, under appropriate standards, recoverable for a clemency hearing; in Coleman, the court resolved that fees for a McCleskey investigation on an exhausted petition were available under the statute;[13] finally, although McKinney tendered the issue at bar, the court found the issue moot since petitioner was not entitled to return to the state court.

Also undermining the Lindsey line of cases is the fact that all three cases adopting its dicta did so without further analysis. Thus the persuasive effect of these later

---

decision in McFarland, 62 U.S.L.W. 4713 (March 29, 1994), may be read as casting some doubt on the holding in Lindsey. Even if this is not the case, however, Lindsey's rationale is inapplicable in this circuit to cases such as that at bar, where the petition contains both exhausted and unexhausted claims and thus falls within Neuschafer.

13. In McCleskey v. Zant, 499 U.S. 467 (1991), the Supreme Court held that the filing of a federal habeas petition raising claims not raised in a previous petition may be treated as an abuse of the writ and thus a petitioner must ordinarily show cause why he failed to raise the claim initially and demonstrate prejudice arising from the court's failure to address the new claim. Counsel for petitioners view McCleskey as, in effect, imposing a new burden to ensure that all possible claims have been identified and exhausted in the first petition.

cases ultimately turns on the persuasiveness of that case. Yet, as I now explain, Lindsey's reasoning is hardly compelling.

The Lindsey court tendered three reasons for reaching its conclusion -- a parade of horribles, the asserted novelty of the result, and an asserted uncertainty concerning the statute's language. Upon examination, each argument is simply unconvincing.

The Lindsey court argued that permitting the payment of fees "under subsection 848(q)(8) would have the practical effect of supplanting the state-court systems for the appointment of counsel in collateral review cases." In re Lindsey, 875 F.2d at 1506. It thought such a holding "would encourage state prisoners to ignore . . . the proper sequence, developed from concerns for federalism, for seeking collateral relief from state-court judgments in death-penalty cases." Id.[14] This speculation concerning

---

14. The court suggested that petitioners "for no reason other than to gain the assistance of federally

the future course of collateral litigation appears to be wholly unwarranted. As Hill demonstrates, a proper regard for the statutory language making the provision of expenses dependent on "reasonable necessity" precludes the granting of expenses when the state court will provide the expenses sought in the federal proceeding. See Hill, 992 F.2d at 803 (services not reasonably necessary unless request made pursuant to a non-frivolous federal habeas proceeding and state law provides no avenue to obtain the services). Thus if a determination of reasonable necessity turns, at least in part, on the unavailability of state-provided fees, the petitioner gains no advantage in circumventing application to the state court when that court will in fact provide fees and expenses.

---

appointed counsel and experts throughout all stages of collateral review (both state and federal), would ignore the exhaustion requirement and, before seeking state remedies, futilely file for federal habeas relief. Only after procuring a federally appointed lawyer would state inmates have an incentive to set upon the right track in pursuit of state remedies." In re Lindsey, 875 F.2d at 1506-07.

A second reason tendered was the novelty of the result. This court is uncertain as to what the Lindsey court regarded as novel. Certainly the federal government has long financed civil litigation in the state courts. See 42 U.S.C. §§ 2996-29961 (Legal Services Corporation Act of 1974). Moreover, as the Ninth Circuit has explained, habeas proceedings are

> [D]ramatically different from any other civil action . . . [and] [a]s a result, [we] are not bound to systemically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purposes of the federal habeas corpus statute.

Brown v. Vasquez, 952 F.2d 1164, 1169 (9th Cir.), cert. denied, 112 S. Ct. 1778 (1992).[15] What is true of the

---

15. In Brown, the circuit looked with favor on the task force's effort to address another special problem presented to district courts discharging their responsibilities under 28 U.S.C. § 2254. The court approved of the local rule which provided that district courts had jurisdiction to stay an execution upon receipt of a request for counsel to assist in preparation of a petition, finding it a habeas proceeding within the meaning of 28 U.S.C. § 2251. Brown, 952 F.2d at 1165-69. Both the Local Rule and Brown were vindicated in McFarland, 62 U.S.L.W. 4713 (March 29, 1994).

federal judiciary is, a fortiori, true for the national legislature. See supra, n.17.

Finally, the Lindsey court suggested that a greater degree of clarity in expression is required.[16] Perhaps it is true that plain meaning, like beauty, is in the eye of the beholder. With the greatest of respect, however, I must declare my own view that the statute's meaning is plain and provides for investigative fees if the costs are reasonably necessary.[17] Put bluntly, it appears to this

---

16. "If Congress had intended so novel a result, we think it would have stated so in unmistakable terms, for example, by expressly providing for the appointment of counsel at federal expense for all inmates seeking collateral review of death sentences, regardless of whether such review was sought in state or federal court." In Re Lindsey, 875 F.2d at 1507.

17. As noted in the text, the High Court in McFarland recently faced the question of whether a request for counsel in a federal death penalty habeas case constituted a proceeding sufficient to stay the state imposed death penalty. The Court explained relative to the federal proceedings that "[o]n its face, this statute grants indigent capital defendants a mandatory right to qualified legal counsel and related services 'in any [federal] post conviction proceeding.'" McFarland, 62 U.S.L.W. at 4714. The Court further explained that "[t]he services of investigators and other experts may be critical

court that the language is plain -- it is the result which Lindsey faults. It is fundamental, however, that when Congress has spoken within its constitutional powers, the courts are bound. As the High Court has explained, when "Congress' intent is . . . plain . . . policy arguments . . . must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it." Laborers Health and Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 551 (1988).

This court feels constrained to note that even the policy argument upon which Lindsey implicitly relies is not wholly persuasive. As I now explain, it is not

---

in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified. Section 848(q)(9) clearly anticipates that capital counsel will have been appointed under § 848(q)(B) before such need for such technical assistance arises . . . Congress thus established a right to preapplication legal assistance for capital defendants in federal habeas proceedings." Id. While the issue tendered here is distinct from that tendered in McFarland, the same rationale applies to both issues.

unreasonable to conclude that comity concerns suggest an interpretation of the statute providing for investigative expenses when the state fails to do so.

It seems likely that petitioners who have been denied both an opportunity to investigate and relief in state court will, when they return to federal court, contend that the state proceedings were not adequate and any factual findings made during the state court proceedings are not binding on the federal court, see 28 U.S.C. § 2254(d)(1)-(8), and/or, that the state's denial of funds results in the waiver of the exhaustion doctrine due to futility. See 28 U.S.C. § 2254(b) (application for writ of habeas shall not be granted unless state court remedies exhausted or "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"). See also Gray v. Greer, 707 F.2d 965, 968-69 (7th Cir. 1983) (failure to exhaust excused where there is no meaningful state remedy); Pickens v. Lockhart,

714 F.2d 1455, 1464 n.9 (8th Cir. 1983) (exhaustion requirement excused where it would be futile). Provision of funds under the federal statute, however, precludes claims that a lack of funding rendered the state court procedures meaningless or futile. Thus, a reading of the federal statute to provide investigative funds when the state fails to do so reduces the potential for litigation concerning the fairness of the state proceedings, an issue far more abrasive in character then the provision of funds itself.

In sum, Lindsey's concern for comity and its rationale for ignoring the statute's plain words seem misplaced. First, the "reasonably necessary" standard minimizes concerns about interfering with the state appointment process. Second, applying the statute as written minimizes the risk of review of issues potentially far more demeaning to the dignity of the state courts than the provision of funds. In any event, however, whether this court's observations concerning the appropriate resolution of

comity concerns or Lindsey is more persuasive, the fact is that policy judgments cannot overcome the congressional determination at issue here.

For the above reasons, I conclude that the statute provides for funds for investigation of unexhausted state claims when such funds are reasonably necessary to pursuit of death penalty habeas relief. Accordingly, IT IS HEREBY ORDERED:

1. The order striking the respondent's appearance and brief is VACATED; and

2. The matter is again REMANDED to the magistrate judge for further proceedings in light of this opinion.

IT IS SO ORDERED.

DATED: July 25, 1994.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,

Petitioner,

vs.

DANIEL VASQUEZ, et al.,

Respondents.

_____/

CIV S-91-0882
LKK PAN P
**DEATH PENALTY CASE**

FINDINGS AND RECOMMENDATIONS

Petitioner Patrick Bruce Gordon is confined at San Quentin state prison pursuant to a May 3, 1985, judgment of the Sacramento County Superior Court sentencing him to death. After an unsuccessful appeal, Gordon filed a habeas corpus petition in this court on July 5, 1991, and amended the petition on October 23, 1992.

On January 26, 1993, respondent moved to dismiss the amended petition filed October 23, 1992, upon the ground that it contained unexhausted claims. On May 4, 1993, the district court stayed this proceeding to allow petitioner to present his unexhausted claims to the state

court and granted petitioner "a 60-day stay of execution in which to seek a further stay from the state court."

Within the time allowed, petitioner obtained an order appointing counsel to represent him in state court. When, however, on April 28, 1993, the California Supreme Court denied petitioner's April 12, 1993, request for funds to investigate potential habeas issues, without seeking state habeas corpus relief, petitioner presented a request for investigative funds to this court pursuant to 21 U.S.C. S 848(q)(4)(B). On June 29, 1993, I denied petitioner's request.

Petitioner sought reconsideration of that order by the district judge and the parties stipulated to an order extending the extant stay of execution pending further order of the court.

On July 25, 1994, Judge Karlton found that section 848(q) authorized disbursement of funds for investigation of claims to be presented to the state court and remanded

the application to me for further proceedings in light of his decision.

Respondent then moved (1) to vacate the June 27, 1994, order staying execution of a sentence of death and (2) to stay execution of Judge Karlton's July 25, 1994, order.

In support of his request to vacate the extant stay of execution of sentence, respondent argues that this court lacks jurisdiction to stay the state court judgment. While there maybe a question about the appropriate length of such a stay, which respondent has not argued, the court's jurisdiction to stay execution of sentence to permit presentation of unexhausted claims to the state court cannot seriously be questioned. Neuschafer v. Whitley, 860 F.2d 1470, 1472 n. 1 (9th Cir. 1988), cert. denied, 493 U.S. 906 (1989). Accordingly, respondent's motion to vacate the stay of execution should be denied.

On or about September 15, 1994, respondent applied to the Ninth Circuit Court of Appeals for a writ requiring

Judge Karlton to vacate his July 25 order authorizing investigation funds. To preserve his right to appellate review, respondent seeks a stay of Judge Karlton's order.

To obtain the requested stay, respondent must show a probability of success before the court of appeals and the possibility of irreparable injury. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). Respondent contends that his attack upon the order will probably succeed because the order conflicts with precedent construing section 848(q), conflicts with 28 U.S.C. § 2254, which requires dismissal of federal habeas petitions containing unexhausted claims, conflicts with the federal principles of abstention and comity, and is contrary to the plain meaning of section 848. Respondent contends that he will suffer irreparable injury because disbursement of any money pursuant to the order will moot the issue and deprive him of appellate review.

Petitioner argues that respondent has not shown probability of success merely by rehashing the same failed

arguments presented to this court and that his attack cannot succeed because he lacks standing to challenge an order giving federal habeas counsel access to federal funds. Petitioner also argues that respondent has demonstrated no cognizable injury while, on the other hand, suspending access to federal investigation funds will inevitably delay the state proceeding and threaten invocation of a state procedural bar for delay.

Respondent's application for a stay of the order authorizing federal investigation funds presents no argument that Judge Karlton has not previously carefully considered and rejected. Although the question may be one about which reasonable judges have differed, respondent has not shown a likelihood of success in the appellate court. In addition, apart from a perceived insult to the abstract principle of comity, respondent has shown no cognizable injury from an order financing petitioner's counsel's efforts to investigate facts in support of federal constitutional claims; indeed, comity assumes that the state

court shares this court's obligation to protect pertinent constitutional guarantees. Finally, the order sought by respondent is more likely to delay the ultimate resolution of petitioner's constitutional attack upon his conviction and death sentence, which is contrary to the paramount interests of all parties. Accordingly, respondent's request for a stay of Judge Karlton's July 25, 1994, order should be denied.

As mentioned at the outset, this proceeding was commenced on July 5, 1991, by filing a pro se petition alleging only that the petitioner's conviction violated his federal constitutional rights. Little productive to the identification and resolution of any federal claims has occurred since.

Almost seven months after counsel was appointed for petitioner, counsel requested funds to investigate claims. This request was denied and on August 21, 1992, I required petitioner by October 23, 1992, to amend his petition to set forth facts which, if found to be true, would

entitle petitioner to the relief requested. Under threat that failure to comply would result in my recommendation for summary dismissal of the petition, petitioner timely filed an amended petition setting forth numerous claims. This pleading only provoked a motion by respondent to dismiss the petition because some of the claims had never been presented to the California courts.

Recently, in McFarland v. Scott, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994), the Supreme Court observed that "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims that their factual bases are researched and identified." This observation provokes reconsideration of my prior disapproval of funds to investigate federal claims.

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991) requires a federal habeas corpus petitioner to include all federal claims in a single federal petition unless in a second proceeding petitioner can excuse prior failure

to include a claim by showing that petitioner did not possess or by reasonable means could not have obtained sufficient basis to allege a claim in the first petition through discovery, expansion of the record or an evidentiary hearing. 111 S.Ct. at 1472. In that case, petitioner was convicted in part upon the evidence of a jailhouse informant who occupied a cell next to McCleskey's and who testified that McCleskey admitted shooting a police officer during a robbery. The Court found that this information was sufficient to put McCleskey on notice of the necessity of investigating a Massiah claim in his first federal habeas petition. Of course, this decision assumes that the federal habeas petitioner has the means to conduct the appropriate investigation. The same assumption is implicit in Fed. R. Civ. P. 81(a)(2), which applies the civil rules of procedure to habeas corpus proceedings--Fed. R. Civ. P. 11 requiring habeas counsel to certify that all of the claims presented "have evidentiary support or, if specifically so identified,

are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The McFarland decision removes any residual doubt about the matter. Federal habeas corpus counsel simply cannot avoid the pitfalls of McCleskey and comply with the obligations of Rule 11 unless given the opportunity to investigate potential habeas claims.

It is also fairly apparent that without the opportunity to conduct reasonable factual investigation, McCleskey virtually compels federal habeas counsel to file a petition containing any conceivable federal claim and that such a petition will invariably contain unexhausted claims. Upon filing such a petition, by virtue of Rose v. Lundy, 455 U.S. 509 (1982), "comity" then compels reference to the state court to allow it the first opportunity to consider the claims. The "new" claims are delivered stillborn because the state court, which has already undertaken appellate review and offered collateral review of the conviction, is bound by neither the mandate nor spirit of federal

procedural rules that allow a fresh federal inquiry. The process is sure if anything to produce delay, which the Supreme Court has recognized is fatal to the state's sovereign interest in the finality of its judgments, and hardly comports with any wise notion of "comity."

On the other hand, by allowing factual development in the federal proceeding, federal habeas counsel may find that there is inadequate factual support for a putative claim, omit it with reasonable professional confidence, and altogether avoid questions of "exhaustion." If there are facts to support a viable claim that ought to be presented in the first instance to the state court, "comity" is respected by presenting it a manner in which it may be expeditiously addressed. Thus, I conclude that the examination of a federal habeas corpus petition for unexhausted claims, required by Rose v. Lundy, supra, ought to be made only after federal habeas counsel has had fair opportunity to conduct a reasonable factual investigation.

Accordingly, I recommend that the order filed May 5, 1993, staying this proceeding to allow petitioner to present his claims to the state court be vacated and that petitioner's counsel be allowed within 30 days to present a new request for either discovery or § 848(q) investigation funds in this proceeding based upon an ex parte demonstration of some reason to believe that a federal claim deserves factual development a la McCleskey.[1/]

For all of the foregoing reasons, I therefore RECOMMEND that:

1. Respondent's motion to vacate this court's June 27, 1993, order staying execution of the state court's judgment sentencing petitioner to death be denied;

---

1. It ought not be adequate simply to desire to explore a fresh defense, there being a strong presumption that petitioner's state court counsel met federal constitutional competency standards. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2054 (1984).

2. Respondent's motion to stay this court's July 25, 1994, order providing access to investigation funds pursuant to 21 U.S.C. § 848(q) be denied;

3. The amended petition filed October 23, 1992, be stricken without prejudice to refiling after adequate factual investigation upon the ground that petitioner was compelled to present it prematurely and without opportunity for adequate factual development;

4. The court's May 4, 1993, order staying this proceeding be vacated;

5. Petitioner be required within 30 days to present a new application for discovery or § 848(q) funds to develop federal claims that petitioner has reasonable notice may exist;

6. Having been allowed reasonable opportunity to investigate facts supporting federal claims, petitioner be allowed reasonable time to amend his petition;

7. If review of an amended petition alleging facts that, if proved, would entitled petitioner to relief, it appears

that any claim has not fairly been presented to the California court, petitioner be allowed opportunity to present such claims to the California court and that the court be allowed fair opportunity to consider such claims; and

8. This court thereafter proceed as promptly as may be possible to resolve federal claims properly put before this court.

These findings and recommendations are submitted to the Honorable Lawrence K. Karlton pursuant to 28 U.S.C. § 636(b)(1)(C). Any party may file written objections to these findings and recommendations pursuant to Fed. R. Civ. P. 72(b) and L.R. 304(b) within 10 days after service.

Date: October 14, 1994.

U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK BRUCE GORDON,

Petitioner,

vs.

DANIEL VASQUEZ, et al.,

Respondents.

No. CIV S-91-0882-LKK PAN

CIV S-91-0882 LKK PAN

ORDER

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 19, 1994, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties

that any objections to the findings and recommendations were to be filed within ten days. On October 31, 1994, respondents filed objections to the findings and recommendations. On November 8, 1994, petitioner filed a response to respondents' objections.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendations filed October 19, 1994, are adopted in full;

2. Respondent's motion to vacate the order filed June 27, 1993, is denied;

3. Respondent's motion to stay the order filed July 25, 1994, is denied;

4. The amended petition filed October 23, 1992, is stricken without prejudice to refiling;

5. The Order filed May 4, 1993, staying this proceeding is vacated;

6. The order filed May 5, 1993, staying this proceeding is vacated to allow petitioner's counsel to present a new request for discovery or § 848(q) investigation funds within 30 days;

7. Having been allowed reasonable opportunity to investigate facts supporting federal claims, petitioner is allowed reasonable time to amend his petition;

8. If review of an amended petition alleging facts that, if proved, would entitle petitioner to relief, petitioner be allowed the opportunity to present such claims to the California court for consideration; and

9. This court thereafter promptly proceed to resolve federal claims properly put before it.

DATED: November 10, 1994.

UNITED STATES DISTRICT JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
AUG 1 1997
CLERK

No. 97-31

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, California State Prison at San Quentin;
DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioners,*

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent.*

PATRICK BRUCE GORDON,

*Real Party in Interest.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS**

Real Party in Interest Patrick Gordon, a state capital prisoner, hereby moves this Court for leave to proceed *in forma pauperis* in filing his opposition to the pending petition for writ of certiorari as well as in any further proceedings in the petition. 28 U.S.C. §1915. Real Party was granted leave to proceed *in forma pauperis* in his application for a writ of habeas corpus (28 U.S.C. §2254) -- the proceeding which led to the filing of the present petition -- by the United States District Court for the



24 pp

Eastern District of California. The district court appointed Real Party's present counsel to represent him in post conviction proceedings pursuant to 21 U.S.C. §848(q)(4)(B).

Respectfully submitted,

Dated: August 1, 1997

By: _____

JAMES R. KIRBY II *
SEGAL & KIRBY
770 L Street, Suite 1440
Sacramento, CA 95814
(916) 441-0828
* Counsel of Record

GAIL R. WEINHEIMER
862 Sir Francis Drake Blvd., Suite 245
San Anselmo, CA 94960-1914
(415) 488-4876

Counsel for Real Party In Interest
Patrick Bruce Gordon

No. 97-31

---

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin;
DANIEL E. LUNGREN, Attorney General of the State of California,

*Petitioners,*

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,

*Respondent.*

PATRICK BRUCE GORDON,

*Real Party in Interest.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

JAMES R. KIRBY II *
SEGAL & KIRBY
770 L Street, Suite 1440
Sacramento, CA 95814
(916) 441-0828

GAIL R. WEINHEIMER
862 Sir Francis Drake Blvd., Suite 245
San Anselmo, CA 94960-1914
(415) 488-4876

Counsel for Real Party In Interest
**PATRICK BRUCE GORDON**

* Counsel of Record

## TABLE OF CONTENTS

Table Of Authorities . . . . . ii

Petitioners' Posited "Question Presented" Is Not Factually or Legally Presented In This Case . . . . . 1

Statement Of The Case . . . . . 2

Summary Of Argument . . . . . 5

Reasons To Deny The Petition . . . . . 9

Conclusion . . . . . 14

## TABLE OF AUTHORITIES

Cases


Allen v. Wright, 468 U.S. 737 (1984) . . . . . 9

Bankers Life v. Holland, 316 U.S. 379 (1953) . . . . . 11

Carnegie Mellon University v. Cahill, 484 U.S. 343 (1988) . . . . . 11

Christy v. Horn, 115 F.3d 201 (3d Cir. 1997) . . . . . 10, 11, 12

Coleman v. Vasquez, 771 F.Supp 300 (N.D.Cal. 1991) . . . . . 12, 13

Delaware Railroad Co. v. Rellstab, 276 U.S. 1 (1928) . . . . . 11

Ex parte Royall, 117 U.S. 241 (1886) . . . . . 13

Fletcher v. Bryan, 361 U.S. 126 (1959) . . . . . 11

Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993) . . . . . 12

In re Joiner, 58 F.3d 143 (5th Cir. 1995) . . . . . 11, 12

In re Lindsey, 875 F.2d 1502 (11th Cir. 1989) . . . . . 12

In re Parker, 49 F.3d 204, 209 (6th Cir. 1995) . . . . . 11, 12

Johnson v. Texas, 878 F.2d 904 (5th Cir. 1989) . . . . . 10

Kerr v. United States District Court, 426 U.S. 394 (1976) . . . . . 10, 11

Massachusetts v. Mellon, 262 U.S. 447 (1923) . . . . . 9

McClellan v. Carland, 217 U.S. 268 (1910) . . . . . 11

McFarland v. Scott, 512 U.S. 849, 114 S.Ct. 2568 (1994) . . . . . Passim

McKinney v. Paskett, 753 F.Supp. 861 (D.Id. 1990) . . . . . 12

Reed v. Ross, 468 U.S. 1 (1984) . . . . . 8

Schlagenhauf v. Holder, 379 U.S. 104 (1964) . . . . . 11

Shaw v. Delo, 971 F.2d 181, 187-88 (8th Cir. 1992) . . . . . 12

Societe Nationale v. United States District Court, 426 U.S. 394 (1976) . . . . . 11

Steffen v. Tate, 39 F.3d 622 (6th Cir. 1994) . . . . . 12

Sterling v. Scott, 57 F.3d 451 (5th Cir. 1995) . . . . . 11, 12

Turner v. Johnson, 106 F.3d 1178 (5th Cir. 1997) . . . . . 11

United States ex rel. Whitehead v. Page, 914 F.Supp. 1541 (N.D.Ill. 1995) . . . . . 12

United States v. Duell, 172 U.S. 576 (1899) . . . . . 10, 11

Wainwright v. Norris, 836 F.Supp. 619 (E.D.Ark. 1993) . . . . . 12

Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) . . . . . 10

Will v. United States, 389 U.S. 90 (1967) . . . . . 10

Withrow v. Williams, 507 U.S. 685, 113 S.Ct. 1745 (1993) . . . . . 8

**Statutes**

21 U.S.C. Section 848 . . . . . 1, 4, 12

21 U.S.C. Section 848(q) . . . . . Passim

21 U.S.C. Section 848(q)(4)(B) . . . . . 5

21 U.S.C. Section 848(q)(9) . . . . . 4, 5

28 U.S.C. Section 1292(b) . . . . . 10

28 U.S.C. Section 2243 . . . . . 7

**Court Rules**

Eastern District Rule 302(c)(17) . . . . . 2

Supreme Court Rule 17.1 . . . . . 11

## PETITIONERS' POSITED "QUESTION PRESENTED" IS NOT FACTUALLY OR LEGALLY PRESENTED IN THIS CASE

As discussed below, the "Question Presented" Petitioners frame -- "Does [sic] 21 U.S.C. Section 848 and *McFarland v. Scott* create a separate 'post conviction proceeding' that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?", Pet. at 1 -- is not presented in this case.

Procedurally, the Court is asked to review an exercise of discretion by the court of appeals in denying a writ of mandamus sought to review an exercise of equitable discretion by a district court. Because the issue could have been raised in an interlocutory appeal, supervisory mandamus was not proper in the first instance. Because the issue presented was not clear and indisputable, but involved the district court's exercise of discretion to conform its procedures to *McFarland*, Petitioners have not demonstrated that this Court should grant review to review the exercise of discretion by two lower courts.

Factually, Real Party in Interest Patrick Gordon, an indigent state capital prisoner, initiated this federal action by filing a skeletal petition for writ of habeas corpus and request for appointment of counsel. This original petition was not dismissed. Rather, the district court struck an amended petition it had ordered Gordon to file. The district court struck the amended petition after concluding its order requiring an amendment upon pain of dismissal was inequitable unless Gordon was first allowed to apply for funds to investigate his federal constitutional claims under 21 U.S.C. §848(q).

Legally, the district court's exercise of discretion to vacate its improvident order did nothing more than conform its procedures to *McFarland*, decided after the order requiring Gordon to amend was entered. The court of appeals, rather than "creating [a] free-floating separate post conviction proceeding untethered to any cognizable claim for relief," Pet. at 15, refused to exercise its own discretion on mandamus to disturb the district court's exercise of equitable discretion in "turning back the clock" to avoid prejudice to the prisoner. The court of appeals also found Petitioners lack standing to challenge an application for investigative funds -- a ruling they do not contest (or even mention) in this petition.

## STATEMENT OF THE CASE[1]

The facts Petitioners submit are incomplete. Their Statement omits facts and oversimplifies the court of appeals' opinion in a manner material to the suitability of this case for review on certiorari. These details are necessary to obtain an accurate picture of what occurred below.

In particular, Petitioners fail to note that Gordon initiated this federal habeas proceeding by filing a "skeletal petition for habeas corpus" and request for appointment of counsel. App. A at 3. Petitioners also fail to mention that, shortly after his present attorneys were appointed, Gordon filed an initial request for investigative funds that was denied. App. D at 6. The magistrate judge[2] then ordered

---

[1]Gordon does not contest jurisdiction or that the cited statutes are implicated.

[2]Petitions for writs of habeas corpus are referred to magistrate judges in the Eastern District of California. E.D.R. 302(c)(17).

Gordon to file an amended petition identifying all potential claims without the benefit of investigative funds or face dismissal of his petition. *Id.* at 6-7. When Gordon filed the coerced amended petition (which contained unexhausted claims), the magistrate judge stayed the federal proceedings to allow him to present his unexhausted claims to a state court. *Id.* at 1-2.

Gordon's application to the California Supreme Court for appointment of counsel was granted; the request for investigative funds he filed in that court was denied. App. A at 4.

Gordon then filed another request for investigative funds in the district court. App. A at 4. The district court found it could stay proceedings on a petition containing unexhausted claims (rather than dismiss the petition), and that Section 848(q) did not bar an award of investigative funds for unexhausted claims. App. C at 30. (These rulings are not challenged here.)

Thereafter, the magistrate judge recognized his original error in forcing Gordon to file an amended petition without benefit of investigative funds in light of *McFarland*, and recommended that the district court (1) vacate the order requiring Gordon to file an amended petition, (2) strike the amended petition only, (3) order Gordon to submit a new request for funds, and (4) after "[a] reasonable opportunity to investigate facts supporting federal claims, petitioner be allowed reasonable time *to amend his petition*." App. D at 12 (emphasis added). The district court adopted his recommendation. App. E.

Petitioners filed a petition for writ of mandamus challenging both orders. Pet. at 4. They focused on the district court's conclusion that Section 848 allowed the district court to award investigative funds for unexhausted claims. App. A at 5-7. Although Petitioners correctly note that their petition for a writ of mandamus was denied, their flat account of the court of appeal's "holding" (Pet. at 5) is not accurate.

Although Petitioners expressly disclaimed any challenge to the district court's original stay in their petition for mandamus, the court of appeals reached out to address the issue anyway. App. A at 8 & n.7. It vacated the portion of the district court's original order holding it should ordinarily stay, rather than dismiss, a mixed petition (a ruling Petitioners fail to note). *Id.* at 8-10. The court of appeals then recognized that the district court had effectively cured its error by striking the improvidently-ordered amended petition and returning the habeas proceeding to its original posture. *Id.* at 6 ("In effect, the district court returned the case back to its original posture before Gordon had alleged his unexhausted claims"). On the question of investigative funds, the court of appeals concluded Petitioners had no standing to contest an *ex parte* request for funds under Section 848(q) (another conclusion Petitioners fail to note and do not challenge). *Id.* at 11-12.

The court of appeals did *not* hold, as implied by Petitioners, that a district court could dismiss the entire federal habeas proceeding, Pet. at 7-12, yet retain jurisdiction to address a request for investigative funds under Section 848(q)(9). Compare Petition

at 5 with App. A at 11.[3] Its "holding" was that the district court efforts to conform its procedures to *McFarland* presented an isolated incident which did not merit the extraordinary remedy of mandamus. App. A at 11.

## SUMMARY OF ARGUMENT

21 U.S.C. Section 848(q) provides for appointment of counsel to represent state capital prisoners in any "post conviction proceeding under [28 U.S.C. §]2254 ...." 21 U.S.C. §848(q)(4)(B). Section 848(q)(9) provides for "reasonably necessary" "investigative, expert or other services" in these proceedings.

In *McFarland v. Scott*, 512 U.S. 849, 114 S.Ct. 2568 (1994), this Court held that a state capital prisoner could initiate a "post conviction proceeding" under Section 848(q) by filing a bare request for counsel or stay; the prisoner was not required to file a petition for writ of habeas corpus to begin a "post conviction proceeding." *Id.* at ___, 114 S.Ct. at 2572 - 73. The "proceeding" initiated by a request for counsel was also a sufficient predicate for the district courts to entertain applications by later-appointed counsel for funds to investigate the petitioner's federal constitutional claims. *Id.* at __, 114 S.Ct. at 2572.

The Court noted the then-prevailing practice in Texas was for indigent capital prisoners to file a "*pro forma* petition" for habeas corpus, request a stay of execution,

---

[3]The prefatory "Overview" states "the district court could properly consider a request for funds under 21 U.S.C. §848(q)(9) even though no habeas petition was pending ...." App. A at 2. This statement does no more than echo *McFarland*. 512 U.S. at ___, 114 S.Ct. at 2572-73. In its later detailed statement of facts, the court of appeals recognized that Gordon's original petition remained on file. *Id.* at 3 & 6. Nothing indicates the court of appeals believed the district court had dismissed the entire federal habeas case and closed its file, yet then proceeded to entertain a request for investigative funds. See App. D & E.

and request appointment of counsel. *Id.* at ___, 114 S.Ct. at 2570 n.1. The Court recognized the risks inherent in these "skeletal petition[s] ... given the substantial possibility that the petition might be dismissed on the merits, and that any habeas petition later filed would be dismissed summarily as an abuse of the writ." *Id.* (discussing a letter filed in the lower court).

In the present case, filed before *McFarland*, the magistrate judge refused an initial request for funds, insisting instead that Gordon file an amended petition containing all possible claims *before* he would address the merits of the request. App. D at 2 & 6-7. The magistrate judge later recognized that his attempt to flush out unexhausted claims by insisting they be included in an amended petition was inappropriate, and further that forcing Gordon to amend his petition without the benefit of investigative funds was both unfair to Gordon and inconsistent with *McFarland.* His analysis (later adopted by the district court, App. E) cannot be improved upon:

> [After denying the initial request for funds], I required [Gordon] ... to amend his petition .... Under threat that failure to comply would result in my recommendation for summary dismissal of the petition, [Gordon] timely filed an amended petition setting forth numerous claims. This pleading only provided a motion by [Petitioners] to dismiss the petition because some of the claims had never been presented to the California courts.
>
> Recently, in McFarland v. Scott, [ 512 U.S. 849] (1994), the Supreme Court observed that "[t]he services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims that their factual bases are researched and identified." *This observation provokes reconsideration of my prior disapproval of funds to investigate federal claims.*

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454 (1991) requires a federal habeas corpus petitioner to include all federal claims in a single federal petition unless in a second proceeding petitioner can excuse prior failure to include a claim by showing that petitioner did not possess or by reasonable means could not have obtained sufficient basis to allege a claim in the first petition through discovery, expansion of the record or an evidentiary hearing. 111 S.Ct. at 1472. .... Of course, this decision assumes that the federal habeas petitioner has the means to conduct an appropriate investigation. The same assumption is implicit in Fed.R.Civ.P. 81(a)(2), which applies the civil rules of procedure to habeas corpus proceedings -- Fed.R.Civ.P. 11 requir[es] habeas counsel to certify that all of the claims presented "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." The McFarland decision removes any residual doubt about the matter. Federal habeas corpus counsel simply cannot avoid the pitfalls of McCleskey and comply with the obligations of Rule 11 unless given the opportunity to investigate potential habeas claims.

It is also fairly apparent that without the opportunity to conduct reasonable factual investigation, McCleskey virtually compels federal habeas counsel to file a petition containing any conceivable federal claim and that such a petition will invariably contain unexhausted claims. Upon filing such a petition, by virtue of Rose v. Lundy, 455 U.S. 509 (1982), "comity" then compels reference to the state court to allow it the first opportunity to consider the claims. ....

On the other hand, by allowing factual development in the federal proceeding, federal habeas counsel may find that there is inadequate factual support for a putative claim, omit it with reasonable professional confidence, and altogether avoid questions of "exhaustion." If there are facts to support a viable claim that ought to be presented in the first instance to the state court, "comity" is respected by presenting it in a manner in which it may be expeditiously addressed. *Thus, I conclude that the examination of a federal habeas corpus petition for unexhausted claims, required by Rose v. Lundy, supra, ought to be made only after federal habeas counsel has had [a] fair opportunity to conduct a reasonable factual investigation.*

App. D at 7-10 (emphasis added).

Habeas proceedings are governed by equitable principles. "The court shall ... dispose of the matter as law *and justice* require." 28 U.S.C. §2243 (emphasis added).

*See, e.g., Withrow v. Williams*, 507 U.S. 685, ___, 113 S.Ct. 1745, 1757 (1993) (O'Connor, J., concurring in part and dissenting in part); *Reed v. Ross*, 468 U.S. 1, 9 (1984). The district court recognized that, in light of *McFarland*, its order requiring an amended petition without benefit of investigation was improvident, and it utilized its equitable powers to correct that error to avoid prejudice to Gordon. In particular, the district court concluded that, given this court's decision in *McCleskey*, counsel for Gordon would necessarily be forced to assert any conceivable claim if required to file an amended petition without the benefit of investigation to avoid a defense of abuse of the writ if those claims were raised for the first time in a later proceeding. App. D at 8-9. *See McFarland*, 512 U.S. at ___, 114 S.Ct. at 2570 n.1 (quoted above). *Cf. Reed*, 468 U.S. at 15-16 (appellate counsel in state criminal proceedings was not required to raise "any and all remotely plausible claims" to avoid a procedural default defense in later federal habeas proceedings).

The court of appeals, while expressly disapproving the district court's earlier conclusion that it was not required to dismiss a petition containing unexhausted claims, nonetheless found no grounds for disturbing the district court's exercise of its equitable powers to "turn back the clock" once it recognized its error in light of *McFarland*. App. A at 11. Both the district court and the court of appeals recognized that, after the district court's remedial order which noted Gordon's still-pending original petition, there was no unmoored "separate 'post conviction proceeding,'" but a post conviction proceeding based upon the original petition. App. A at 6 ("In effect, the district court

returned the case back to its procedural posture before Gordon had alleged his unexhausted claims."); App. D at 12.

To summarize, the district court's exercise of equitable discretion to adjust the procedural posture of a habeas proceeding in light of a new decision from this Court did not present extraordinary circumstances meriting the exercise of supervisory mandamus.

Assuming for the moment that the district court had actually dismissed both the amended and original petitions as argued by Petitioners, Petitioners do not have standing to object that a federal court is entertaining an application for federal investigative funds. *See Massachusetts v. Mellon*, 262 U.S. 447, 48-82 (1923). *See also Allen v. Wright*, 468 U.S. 737, 754 (1984). As noted, Petitioners do not mention, much less challenge in this petition, the court of appeals' conclusion that they lacked standing to complain of a request for investigative funds.

## REASONS TO DENY THE PETITION

The district court exercised equitable powers to correct an error which became apparent after this Court's decision in *McFarland*. The court of appeals, while disapproving earlier actions by the district court (which are not at issue in this petition), found no reason to disturb the district court's attempt to conform its actions to a then-recent decision of this Court. The court of appeals found Petitioners had no standing to challenge a request for investigative funds, a conclusion they do not contest. The court of appeals exercised its own discretion in denying mandamus.

Mandamus is a discretionary remedy which may be invoked only if the moving party's right to relief is "clear and indisputable." *United States v. Duell*, 172 U.S. 576, 582 (1899). "[I]ssuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976). "Courts faced with petitions for peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n.6 (1967). This Court has strongly suggested that mandamus should not be employed when the question presented involves an exercise of discretion by the district court that could be raised by an interlocutory appeal. *See Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 n.7 (1978) (plurality opinion).

When the district court initially decided to stay proceedings, rather than dismiss the amended petition containing unexhausted claims, Petitioners could have requested certification for immediate appeal, 28 U.S.C. §1292(b), but did not do so. Two courts of appeal have found such stays immediately appealable under the collateral order doctrine. *See Christy v. Horn*, 115 F.3d 201, 203-206 (3d Cir. 1997); *Johnson v. Texas*, 878 F.2d 904, 905-906 (5th Cir. 1989). Mandamus was not the appropriate vehicle for Petitioner's challenge to the district court's rulings and the court of appeals' denial of relief is proper on that ground alone. Moreover, the suitability of this case for review on certiorari presents three layers of discretion: (1) the district court's exercise of equitable discretion to modify the procedural posture of the habeas

case to conform with *McFarland*, see App. D at 7-11; (2) the court of appeals' exercise of discretion to deny the writ (after correcting a perceived error not presented by this petition), see App. A at 11; and (3) this Court's discretion to limit its docket to questions that are "special and important." See S.Ct.R. 17.1. These layers of discretion explain why this Court has historically reviewed only a handful of court of appeals decisions denying petitions for writs of mandamus.[4] Nothing suggests this district court's isolated attempt to conform its procedures to a recent ruling of this Court presents a "special and important" issue given this background.

Finally, Petitioners do not establish this denial of mandamus "conflicts with every other decision that has considered the scope of the 'post conviction proceeding' created by section 848 and *McFarland*." Pet. at 13. Not one case they cite addresses the present scenario where a district court forced a habeas petitioner to amend his petition without meaningfully addressing his request for investigative funds, then thought better of its actions in light of *McFarland*.

Petitioners cite the following cases as inconsistent with the court of appeals' decision: *Christy v. Horn*, 115 F.3d 201 (3d Cir. 1997); *Turner v. Johnson*, 106 F.3d 1178, 1182-83 n.8 (5th Cir. 1997); *In re Joiner*, 58 F.3d 143 (5th Cir. 1995); *Sterling v. Scott*, 57 F.3d 451, 457 (5th Cir. 1995); *In re Parker*, 49 F.3d 204, 209 (6th Cir.

---

[4]The Court appears to have granted certiorari to review the denial of a petition for writ of mandamus by a federal court of appeals only nine times in the past 100 years. *See, e.g., Carnegie Mellon University v. Cahill*, 484 U.S. 343 (1988); *Societe Nationale v. United States District Court*, 426 U.S. 394 (1976); *Kerr*, 426 U.S. 394; *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *Fletcher v. Bryan*, 361 U.S. 126 (1959); *Bankers Life v. Holland*, 316 U.S. 379 (1953); *Delaware Railroad Co. v. Rellstab*, 276 U.S. 1 (1928); *McClellan v. Carland*, 217 U.S. 268 (1910); *Duell*, 172 U.S. 576.

1995); *Steffen v. Tate*, 39 F.3d 622, 624 (6th Cir. 1994); *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993); *Shaw v. Delo*, 971 F.2d 181, 187-88 (8th Cir. 1992); *In re Lindsey*, 875 F.2d 1502 (11th Cir. 1989); *Wainwright v. Norris*, 836 F.Supp. 619, 621 (E.D.Ark. 1993); *Coleman v. Vasquez*, 771 F.Supp 300, 304 n.5 (N.D.Cal. 1991); *McKinney v. Paskett, 753 F.Supp. 861 (D.Id. 1990); United States ex rel. Whitehead v. Page*, 914 F.Supp. 1541 (N.D.Ill. 1995); Pet. at 13. Each case either involves a different legal issue or arose in a different procedural posture. For example, in ten of the thirteen cited cases, the prisoner asked the federal court to take some action to facilitate state court litigation,[5] or to act despite pending state proceedings.[6] In addition, a mixed or totally unexhausted petition had been filed and denied or dismissed in three of the cited cases,[7] and no petition had ever been filed in three others.[8] Three of the cases -- *Steffen*, *Parker*, and *Turner* -- do not address the "scope of the post-conviction proceeding" under Section 848 at all. Rather, they refuse to

---

[5]In *Joiner*, *Sterling*, *Hill*, *Shaw*, *Lindsey*, *Wainwright*, and *McKinney*, capital petitioners sought appointment of counsel for representation in state proceedings or federal funding for experts to testify in state proceedings. *Joiner*, 58 F.3d at 144; *Sterling*, 57 F.3d at 454; *Hill*, 992 F.2d at 802 - 803; *Shaw*, 971 F.2d at 188; *Lindsey*, 875 F.2d at 1505; *Wainwright*, 836 F.Supp. at 619 - 620; *McKinney*, 753 F.Supp. at 865. In *Steffen*, 39 F.3d at 623, petitioner sought a stay of execution to further exhaust state remedies; similarly, in *Sterling* and *Christy* the petitioners sought to hold mixed petitions in abeyance pending exhaustion. *Sterling*, 57 F.3d at 452; *Christy*, 115 F.3d at 203. (Again, Petitioners do not challenge the district court's original stay on grounds later disapproved by the court of appeals). Moreover, *Lindsey* and *Shaw* involved successor federal petitions. *Lindsey*, 875 F.2d at 1503; *Shaw*, 971 F.2d at 183.

[6]*Whitehead*, 914 F.Supp. at 1543 (request for federal counsel was premature when claims were "actively under review" in state court).

[7]*Sterling*, 57 F.3d at 453; *Shaw*, 971 F.2d at 188; *Lindsey*, 875 F.2d at 1504.

[8]*Parker*, 49 F.3d at 206; *Steffen*, 39 F.3d at 623; *Whitehead*, 914 F.Supp. at 1541.

extend *McFarland* to cases in which the attorney who represented the petitioner in state proceedings sought the stay *McFarland* authorized for counsel new to the case (Gordon's present attorneys did not represent him in earlier state court matters),[9] or to federal counsel who had already filed a comprehensive federal petition.

Although decided before *McFarland*, the final case cited by Petitioners, *Coleman v. Vasquez*, is consistent with both *McFarland* and the district court's exercise of equitable discretion to allow investigation before requiring an amended petition (an exercise of discretion the court of appeals refused to disturb on mandamus).

> The investigation of possible claims under Section 848(q) ... does no violence to the exhaustion doctrine, which is limited to the *adjudication* of constitutional claims. That attorneys ... may research and investigate unexhausted claims -- in precisely the same manner that privately retained attorneys may research and investigate such claims -- does not intrude on state sovereignty. The federal court in no way has trod on the state court's resolution of the federal constitutional issues. Following the investigation, the prisoner either will decide that a claim exists and pursue it in state court, in accordance with the exhaustion requirement, or will decide the claim is not tenable and abandon it.

*Coleman*, 771 F.Supp. at 303 (emphasis added).

After all, both the state and federal court are charged with the responsibility to determine if the conviction and death sentence of the prisoner violated the federal constitution. *See Ex parte Royall*, 117 U.S. 241, 251 (1886). Particularly on the specific facts of this case, where the state court has denied investigative funds, the state

---

[9]Petitioners' musings about Gordon's former counsel in state proceedings, Pet. at 10, are not supported by the record. Petitioners intimate Gordon personally robbed and murdered the victim, Pet. at 3-4, when, in fact, he allegedly "drove the getaway car during commission of the robbery and murder." App. A at 3 n.2. Of course, neither point has anything to do with the issue presented in this petition.

had no interest in a federal court's decision to entertain a request for federal funds in a federal proceeding. (Petitioners have not challenged the court of appeals' determination that they have no standing to object to an award of investigative funds). If the prisoner is awarded investigative funds and discovers meritorious unexhausted claims, should the prisoner return to state court to exhaust those claims the state courts will receive the benefit of a more fully developed factual record upon which to address them.

Where, as here, the district court recognized its error in demanding the prisoner file an amended petition before allowing investigation of possible claims and moved to correct that error, the district court did not abuse its discretion in doing so, the court of appeals did not abuse its discretion in refusing to interfere through issuance of an extraordinary writ, and these multiple layers of discretionary decisions present no issue worthy of consideration on certiorari.

///

///

///

## CONCLUSION

Petitioners employed the wrong procedural vehicle below, they seek review of multiple discretionary decisions, and they lack standing to complain. The petition should be denied.

Respectfully submitted,

Dated: August 1, 1997

By: _____

JAMES R. KIRBY II *
SEGAL & KIRBY
770 L Street, Suite 1440
Sacramento, CA 95814
(916) 441-0828
* Counsel of Record

GAIL R. WEINHEIMER
862 Sir Francis Drake Blvd., Suite 245
San Anselmo, CA 94960-1914
(415) 488-4876

Counsel for Real Party In Interest
Patrick Bruce Gordon

## PROOF OF SERVICE

I am a citizen of the United States employed in the City and County of Sacramento. My business address is 770 L Street, Suite 1440, Sacramento, California, 95814. I am over the age of eighteen years and not a party to the above-entitled action.

I am familiar with the firm's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On **August 1, 1997,** I served the following:

**SUPREME COURT OF THE UNITED STATES APPEARANCE FORM/WAIVER;**

**MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;**

**REAL PARTY IN INTEREST'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

X on the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail

____ on the parties in this action by causing a true copy thereof to be delivered by hand to the offices of the addressee(s)

____ by United Parcel Service

addressed as follows:

Ward A. Campbell
Deputy Attorney General
Department of Justice
1300 I Street, Suite 1101
Sacramento, CA 95814

Gail R. Weinheimer, Esquire
862 Sir Francis Drake Blvd., Suite 245
San Anselmo, CA 94960-1914

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed on August 1, 1997, at Sacramento, California.

Karen A. Armstrong
KAREN A. ARMSTRONG

Segal & Kirby
*Attorneys*
The Union Bank of California Center
770 L Street, Suite 1440
Sacramento, California 95814

Telephone (916) 441-0828
Facismile (916) 446-6003

August 1, 1997

Supreme Court of the United States
One First Street, NE
Washington, DC 20543

Re: *Arthur Calderon v. United States District Court, Eastern District*
Docket No. 97-31

Dear Clerk:

Please forward an endorsed-filed copy of our Motion for Leave to Proceed in Forma Pauperis and Opposition to Petition for Writ of Certiorari in the attached self-addressed, stamped envelope provided for your convenience.

Thank you in advance for your assistance in this matter.

Very truly yours,

Karen A. Armstrong

Karen A. Armstrong, Secretary to
JAMES R. KIRBY II

/kaa
Enclosures

RECEIVED
AUG 0 4 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPEARANCE FORM / WAIVER

# SUPREME COURT OF THE UNITED STATES

No. 97-31

Arthur Calderon, et al. (Petitioner) v. U.S. District Court, Eastern District (Respondent)

Patrick Bruce Gordon, Real Party in Interest

I do not intend to file a response to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☒ Please enter my appearance as Counsel of Record for ~~all respondents~~ Real Party in Interest, Patrick Bruce Gordon

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed from when you were admitted):

Signature

Date: August 1, 1997

(Type or print) Name James R. Kirby II

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Segal & Kirby

Address 770 L Street, Suite 1440

City & State Sacramento, California Zip 95814

Phone ( 916 ) 441-0828

A copy of this form must be sent to petitioner's counsel or to petitioner if *pro se*. Please indicate below the name(s) of the recipient(s) of a copy of this form:

CC: Ward A. Campbell, Deputy Attorney General
Counsel of Record for Petitioner
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

CLER-0080-9-95

Supreme Court, U.S.
FILED
SEP 5 1997
CLERK

No. 97-31

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Respondent*,

PATRICK BRUCE GORDON, *Real Party in Interest.*

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

# REPLY BRIEF TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General
WARD A. CAMPBELL*
Deputy Attorney General
*Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5251
Fax: (916) 324-2960
Counsel for Petitioners

28 pp

## CAPITAL CASE

## QUESTIONS PRESENTED

Do 21 U.S.C section 848 and *McFarland v. Scott* create a separate "post conviction proceeding" that survives the dismissal of a petition for writ of habeas corpus containing unexhausted claims?

## TABLE OF CONTENTS

Page

**THIS COURT'S SUPERVISORY POWER REQUIRES REVIEW OF THE NINTH CIRCUIT'S AND DISTRICT COURT'S HOLDINGS THAT 21 U.S.C. SECTION 848 VESTS JURISDICTION IN THE FEDERAL COURT EVEN AFTER THE DISMISSAL OF A MIXED PETITION UNDER *ROSE V. LUNDY*** 1

CONCLUSION 10

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases** | |
| *Arizonans for Official English v. Arizona* ___ U.S. ___, 117 S. Ct. 1055 (1997) | 8 |
| *Armster v. United States Dist. Court* 806 F. 2d 1347 (9th Cir. 1986) | 4-6 |
| *Brown v. Vasquez* 952 F.2d 1164 (9th Cir. 1991) | 2 |
| *Calderon v. District Court (Gordon)* 107 F. 3d 756 (9th Cir. 1997) | 2, 4 |
| *Christy v. Horn* 115 F. 3d 201 (3rd Cir. 1997) | 6, 7, 9 |
| *Coleman v. Vasquez* 771 F. Supp. 300 (N.D. Cal. 1991) | 9 |
| *County of Los Angeles v. Davis* 440 U.S. 625 (1979) | 5 |
| *Deakins v. Monaghan* 484 U.S. 193 (1988) | 7 |
| *Firefighters v. Stotts* 467 U.S. 561 (1984) | 5 |
| *Gordon v. Vasquez* 859 F. Supp. 413 (E.D. Cal. 1994) | 1, 3, 6, 8 |

## TABLE OF AUTHORITIES, CONT'D

*Hill v. Lockhart*
992 F. 2d 801 (8th Cir. 1993) 9

*In re Blodgett*
502 U.S. 236 (1992) 5, 7

*In re Cement Antitrust Litig.*
688 F. 2d 1297 (9th Cir. 1982) 5, 6

*In re Clark*
21 Cal. Rptr. 509 (1993) 3

*In re Joiner*
58 F. 3d 143 (5th Cir. 1995) 9

*In re Lindsey*
875 F. 2d 1502 (11th Cir. 1989) 8, 9

*In re Parker*
49 F. 3d 204 (6th Cir. 1995) 3, 8

*In re Virginia Electric & Power Co.*
539 F. 2d 357 (4th Cir. 1976) 5

*Johnson v. Texas*
878 F. 2d 904 (5th Cir. 1989) 7

*La Buy v. Howes Leather Co.*
352 U.S. 249 (1957) 6

*McFarland v. Scott*
512 U.S. 849 (1994) 2-4, 7-9

## TABLE OF AUTHORITIES, CONT'D

*McKinney v. Paskett*
753 F. Supp. 861, 865 (D.Id. 1990) 9

*Rose v. Lundy*
455 U.S. 509 (1982) 4

*Schlagenhauf v. Holder*
379 U.S. 104 (1965) 6

*Shaw v. Delo*
971 F.2d 181 (8th Cir. 1992) 8

*Steffen v. Tate*
39 F. 3d 622 (6th Cir. 1994) 3, 8

*Sterling v. Scott*
57 F. 3d 451 (5th Cir. 1995) 7, 8

*Turner v. Johnson*
106 F. 3d 1178 (5th Cir. 1997) 3, 8

*United States ex rel. Whitehead v. Page*
914 F. Supp. 1541 (Ill. 1995) 9

*United States v. W.T. Grant Co.*
345 U.S. 629 (1953) 5

*Victor v. Hopkins*
90 F. 3d 276 (8th Cir. 1996) 9

*Vitek v. Jones*
445 U.S. 480 (1980) 5

## TABLE OF AUTHORITIES, CONT'D

*Wainwright v. Norris*
836 F. Supp. 619 (E.D. Ark. 1993) 9

**Statutes**

21 U.S.C.
§ 848 1-9

28 U.S.C.
§ 1651 5
§ 1983 7
§ 2254 1

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1997

No. 97-31

---

ARTHUR CALDERON, Warden, California State Prison at San Quentin; DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, *Respondent*.

---

**THIS COURT'S SUPERVISORY POWER REQUIRES REVIEW OF THE NINTH CIRCUIT'S AND DISTRICT COURT'S HOLDINGS THAT 21 U.S.C. SECTION 848 VESTS JURISDICTION IN THE FEDERAL COURT EVEN AFTER THE DISMISSAL OF A MIXED PETITION UNDER *ROSE V. LUNDY***

The question presented in this case is whether the "post-conviction proceeding" commenced under 28 U.S.C. section 2254 by a pre-petition request for appointment of counsel under 21 U.S.C. section 848 [hereinafter "section 848"] continues once the habeas corpus petition is filed and even after the petition has been dismissed for failure to exhaust. This was the essential holding of the district court in *Gordon v. Vasquez*, 859 F. Supp. 413, 416-421 (E.D. Cal. 1994) (Petn. App. C

at pp.14-30) and of the Ninth Circuit in *Calderon v. District Court (Gordon)*, 107 F. 3d 756, 761-762 (9th Cir. 1997) (App. A at pp. 12-13). Real party in interest Gordon does not deny that the creation of a separate proceeding in which the federal district court maintains jurisdiction over the case even though the parties are conducting collateral, competency, and clemency proceedings in state forums raises issues relating to the administration of the courts.[1/]

Gordon argues that the case is moot because of a procedural maneuver by the district court which occurred after the State commenced mandamus proceedings in the Ninth Circuit. As explained in the petition filed with this Court, the district court held that it had jurisdiction to grant a section 848 fees request even though proceedings were stayed so that Gordon could litigate unexhausted claims. The State initiated mandamus proceedings. The district court tried to moot the mandamus proceedings by vacating its stay of the federal proceedings, "striking" the 80-claim petition, and permitting Gordon to seek investigative funds. To evade the mandamus proceedings, the district court turned the clock back in Gordon's case by almost two years to the time before he filed his 80-claim petition. The district court used the pretext that this Court's decision in *McFarland v. Scott*, 512 U.S. 849 (1994) now permitted investigation and development of unexhausted claims. App. D at pp. 7-10. However, *McFarland* was not a "new"

---

1. The State concedes the grammatical error in the question presented (Opp. at p. 1.). Gordon incorrectly claims that the State's Statement of the Case was misleading. Not so. Gordon did file what has been stylized as a "skeletal petition for habeas corpus." However, the pleading was in no way a true "petition." *McFarland v. Scott*, 512 U.S. 849 (1994); *Brown v. Vasquez*, 952 F.2d 1164, 1166, fn. 7 (9th Cir. 1991). The State did note that Gordon's initial request for investigative funds was denied on the ground that the request related only to unexhausted claims. Petn. at p. 10.

case and had been available as a reason for this new decision even prior to the district court's earlier decision to entertain a section 848 request when Gordon had been sent back to state court. The district court indicated that it believed that its new decision would have the effect of mooting the State's mandamus proceedings. See App. G at p. 4 attached to this Reply. The district court's belated order did not repudiate or abandon its prior published opinion in *Gordon v. Vasquez*.[2]

The Ninth Circuit ultimately denied the petition on the grounds of mootness because of the district court's maneuver of "dismissing" the mixed petition. However, the Ninth Circuit left intact the district court's published opinion holding that section 848 permitted a district court to grant investigative fees requests even while exhaustion proceedings were pending in state court and to also appoint lawyers for state collateral, competency, and clemency proceedings.[3] Furthermore, the Ninth Circuit's

---

2. *McFarland* is readily distinguishable from this case. First, the record shows Gordon was represented by state counsel, the California Public Defender, on direct review. Contrary to Gordon's assertion, his state attorney had the opportunity to file a state habeas petition. Attached to this reply as App. F is Exhibit XXIV of the "Amended Petition and/or Supplemental Pleading to Petition for Writ of Mandamus and/or Prohibition Filed September 19, 1994 and Request for Stay of Order" filed with the Ninth Circuit in this matter. That exhibit is a declaration by Gordon's state attorney, dated March 12, 1990, indicating that he had reviewed the record in preparation for oral argument "and for filing a petition for writ of habeas corpus...." App. F at p. 2. A year before, the California Supreme Court had promulgated policies for the investigation and filing of habeas corpus petitions by state appellate counsel. *In re Clark*, 21 Cal. Rptr. 509, 520, 542, 550-551 (1993). Thus, unlike the unrepresented petitioner in *McFarland*, Gordon has always been represented for purposes of state collateral review. *Steffen v. Tate*, 39 F. 3d 622, 627-629 (6th Cir. 1994); *In re Parker*, 49 F. 3d 204, 209 (6th Cir. 1995); *Turner v. Johnson*, 106 F. 3d 1178, 1183, fn. 8 (5th Cir. 1997). Second, Gordon's federally appointed counsel had already been appointed and had filed a petition in federal court with 80 claims.

3. The district court held that it had authority under section 848 to

opinion held that a district court may still entertain fees requests under 21 U.S.C. section 848 even after a petition has been dismissed for failure to exhaust.

> "[W]e are not required to order *sua sponte* that the district court must deny the section 848(q)(9) fees request simply because we uphold the district court's dismissal of the mixed petition without prejudice. Under *McFarland* [citation omitted] the district court may consider a section 848(q) fees request even when a habeas petition is not presently pending before the federal courts." *Calderon*, 107 F. 3d. at 761; App. A at 12-13.

The State submits that both the district court and the Ninth Circuit wrongly interpreted section 848 and *McFarland*. The district court's evasion of its earlier published opinion was no more than the voluntary cessation of conduct that violated this Court's decision in *Rose v. Lundy*, 455 U.S. 509 (1982) requiring the dismissal of mixed petitions. Given the district court's and the Ninth Circuit's opinions, there is reasonable assurance that the violation will recur.

> "A change of activity by a defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy." *Armster v. United States Dist. Court*, 806 F. 2d 1347, 1357 (9th Cir. 1986).

---

entertain a fees request because it had merely stayed petition proceedings for purpose of exhaustion. The Ninth Circuit held that the petition should have been dismissed, but otherwise agreed with the district court that it had jurisdiction under section 848 even after the dismissal of a mixed habeas petition.

The Ninth Circuit affirmed the district court's opinion that it had jurisdiction to grant section 848 fee requests even after a mixed petition had been dismissed. It left in force the district court's opinion that it could grant fee requests even after Gordon had returned to state court to commence exhaustion proceedings. Buttressed by the Ninth Circuit's opinion, the district court's opinion remains undisturbed. Gordon does not indicate that the district court's opinion was wrong.

The district court's tactical retreat cannot defeat the broader public interest in this Court giving guidance to all district courts. It is not "absolutely clear" that the wrongful behavior cannot reasonably be expected to recur. Gordon has failed to carry his heavy burden of showing mootness. *Firefighters v. Stotts*, 467 U.S. 561, 569-570 (1984); *Vitek v. Jones*, 445 U.S. 480, 487 (1980); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953); *Armster*, 806 F. 2d at 1357-1361 (concerning guidance function of supervisory and advisory mandamus); *see also*, *In re Blodgett*, 502 U.S. 236, 240 (1992) (declining to issue writ, but articulating explicit judicial duties in litigation of capital cases); cf. *County of Los Angeles v. Davis*, 440 U.S. 625,631-633 (1979).

Gordon tries muddying the waters by raising a brand new argument--that the State should have challenged the district court's order by interlocutory appeal rather than petition by writ of mandamus. He did not raise this objection below. Furthermore, the Ninth Circuit Court of Appeals explicitly found that it had jurisdiction under 28 U.S.C. section 1651 due to its supervisorial powers to guide the district court on important questions of law relating to the orderly and efficient administration of the district courts. App. A at p. 7 citing *In re Cement Antitrust Litig.*, 688 F. 2d 1297, 1307 (9th Cir. 1982); *see also*, *In re Virginia Electric & Power Co.*, 539 F. 2d 357, 365 (4th Cir. 1976) (both interlocutory appeal and mandamus will lie when question

relates to appellate supervisory power). A holding that a dismissal of a mixed petition did not dismiss the federal action initiated by the preapplication request for appointment of counsel under section 848 had implications for the operation and administration of the courts throughout the Ninth Circuit. *In re Cement Antitrust Litig.*, at 1303-1304. Since the interpretation was a pure legal question, it could be reviewed for purposes of determining whether there was a clear and indisputable right to relief. *Id.* at 1305, fn. 5.

Supervisory control by mandamus is appropriately exercised when there is a clear abuse of discretion or a usurpation of judicial power. *Schlagenhauf v. Holder*, 379 U.S. 104, 109-111 (1965); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257, 260 (1957). Furthermore, the Ninth Circuit was actually construing the validity and reach of a local rule of court that had been adopted as a "model" for district courts throughout the entire Ninth Circuit. *Gordon*, 859 F. Supp. at 417, fn. 7, 420, fn. 15; Petn. App. C at 14 fn. 7; *La Buy*, at 256-258; *Schlagenhauf*, at 112. Since this was an issue of first impression in the Ninth Circuit and since the district court had issued an opinion that was either contrary to or inconsistent with all other authority, review by mandamus was appropriate. The petition presented a substantial allegation of usurpation of judicial power. *Schlagenhauf*, at 110-111 (maj. opn.), 128 (Harlan, J. dis.). Whether denominated supervisory or advisory mandamus, review by writ was appropriate to provide guidance to all district courts. *Armster v. United States District Court*, 806 F. 2d 1347, 1352-1361 (9th Cir. 1986).

Gordon's argument as to the propriety of interlocutory appeal supports the State's argument in this case. Gordon argues that when the district court stayed proceedings rather than dismissing his mixed petition, that an interlocutory appeal was appropriate. He cites *Christy v. Horn*, 115 F. 3d 201, 203 (3rd Cir. 1997) (habeas corpus

proceeding) and *Johnson v. Texas*, 878 F. 2d 904 (5th Cir. 1989) (28 U.S.C. section 1983 civil rights action) as authorities for his argument. In both of those cases, the issue was whether the district court had the power to hold a proceeding in abeyance and also, in the *Christy* case, stay an execution while state court exhaustion proceedings were litigated. As *Johnson* explained, the litigant was left with no recourse but to proceed to exhaust state remedies without further recourse to the district court before those remedies were exhausted. *Johnson*, 878 F. 2d at 906. Thus, appeal was appropriate.

Neither *Christy* nor *Johnson* involved the novel two-tiered "post conviction proceeding" presented in this case. Although the district court stayed proceedings on Gordon's habeas corpus petition for purposes of exhaustion, it did not stay or dismiss what it identified as an ongoing, separate "post conviction proceeding" initiated by Gordon's request for appointment of counsel under 21 U.S.C. section 848 and *McFarland*. The district court indicated it would continue to exercise jurisdiction and intrude into ongoing state court processes by entertaining fee requests under section 848. The district court also explained that it interpreted section 848 as permitting appointment of counsel in state court competency and clemency proceedings. Thus, unlike the litigants in *Christy* and *Johnson* in his opposition, Gordon was left with a recourse to a "hover[ing]" district court "whenever [he] concluded that the things [in state court or state executive clemency proceedings] were proceeding unsatisfactorily...." *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988). The "Gordon proceeding" poses the very real risk of federal interference with state court and executive processes. *Sterling v. Scott*, 57 F. 3d 451, 457 (5th Cir. 1995).[4]

---

4. Thus, the State has standing the chalenge the interpretation of section 848. Compare, *Blodgett*, 502 U.S. at 239-240. The State has shown a concrete and particularized, actual or imminent invasion of a legally protected interest.

No other court, including this Court, has intimated or assumed that such a "dual proceeding" exists. No other court has flung open the "narrow window" created by *McFarland*. *In re Parker*, 49 F. 3d 204, 210-213 (6th Cir. 1995) (*McFarland* is not available for every Death Row inmate since it "slightly expand[ed] federal jurisdiction" to stay executions for unrepresented petitioners who are entitled to appointment of counsel for preparation of a habeas corpus petition); *see also*, *Steffen v. Tate*, 39 F. 3d 622, 628 (6th Cir. 1994) (*McFarland* did not create a generalized repeal of the requirement that a habeas petition must be pending for a federal court to stay an execution, but only applied to limited situation where a truly unrepresented prisoner requires a lawyer to prepare a petition).

Contrary to Gordon's assertion, *Turner v. Johnson*, 106 F. 3d 1178, 1182-1183 & fn. 8 (5th Cir. 1997) specifically held that *McFarland* concerned only the period of time between the appointment of counsel and filing of the initial petition. Once a "comprehensive petition" has been filed, "*McFarland* has no application."

Similarly, in *Sterling v. Scott,* 57 F. 3d 451 (5th Cir. 1995) the court held that section 848 did not entitle a petitioner to "use the federal district court merely as a jurisdictional parking lot so that he may somehow attach a right to federally paid counsel to a non-cognizable pleading." *Id.* at 454. An appointment of counsel in federal court did not survive the dismissal of a mixed petition. *Id.* at 458; *see also*, *In re Lindsey*, 875 F. 2d 1502, 1506 (11th Cir. 1989) (section 848 does not encompass state court collateral, competency, or clemency proceedings occurring subsequent to initiation of federal proceedings); *Shaw v. Delo*, 971 F.2d 181, 188 (8th Cir.

---

*Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S. Ct. 1055, 1067 (1997); *Gordon v. Vasquez*, 859 F. Supp. at 415; App. C at p. 6.

1992) (since merits of unexhausted claim not properly before district court, it was appropriate to deny motion for investigative and expert services); *In re Joiner*, 58 F. 3d 143, 144 (5th Cir. 1995) (*McFarland* resolved the timing of a section 848 proceedings, not its scope. Section 848 provides counsel only for proceedings after the end of state court proceedings and there is no right to federally appointed counsel or federal fees for state court exhaustion even for unrepresented petitioner); *Christy v. Horn*, 115 F. 3d 201, 207 (3rd Cir. 1997) (although petitioner secured pre-petition appointment of counsel and stay of execution under section 848, petitioner was not entitled to a stay of execution when petition was dismissed for failure to exhaust); *Victor v. Hopkins*, 90 F. 3d 276 (8th Cir. 1996) (court cannot maintain stay of execution when mixed petition is dismissed); *McKinney v. Paskett*, 753 F. Supp. 861, 865 (D.Id. 1990) citing *In re Lindsey*, 875 F. 2d 1502, 1506 (11th Cir. 1989) (section 848 does not encompass federal payment of counsel for any state proceeding initiated in connection with the representation of a habeas petitioner in a capital case in federal court); *Coleman v. Vasquez*, 771 F. Supp. 300, 304 fn. 5 (N.D. Cal. 1991) (petitioner who seeks to exhaust claims must seek renumeration from state court); *United States ex rel. Whitehead v. Page*, 914 F. Supp. 1541,1543 (Ill. 1995) (section 848 does not authorize appointment or payment of counsel while claims are being actively reviewed by state court); *Wainwright v. Norris*, 836 F. Supp. 619, 621 (E.D. Ark. 1993) (lawyers in federal court cannot manipulate system by seeking payment for pursuing unexhausted claims in state court after filing for federal habeas relief); but see, *Hill v. Lockhart*, 992 F. 2d 801, 803 (8th Cir. 1993) (section 848 does not apply to pursuit of state collateral remedies, but arguably permits compensation for representation in state competency and clemency proceedings if state does not compensate lawyers)

By giving its imprimatur to the district court's opinion, the Ninth Circuit sanctioned a departure from the accepted and usual course of judicial proceedings sufficient to call for an exercise of this Court's supervisory power.

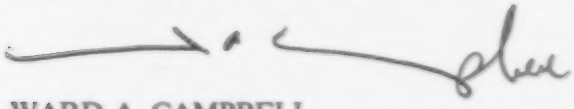
## CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari already on file, petitioners request that the Petition for Writ of Certiorari be granted.

Dated: September 3, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Supervising Deputy Attorney General



WARD A. CAMPBELL
Deputy Attorney General
Counsel of Record

Counsel for Petitioners

WAC:sc

**APPENDIX "F"**

**(Exhibit XXIV of the "Amended Petition and/or Supplemental Pleading to Petition for Writ of Mandamus and/or Prohibition and Request for Stay of Order) filed September 19, 1994, in *Calderon v. District Court (Gordon)* (No. 94-70565))**

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

| | | |
|---|---|---|
| **THE PEOPLE OF THE STATE OF CALIFORNIA,** | ) | C004684 |
| | ) | |
| Plaintiff and Appellant, | ) | Crim. No. 24551 |
| | ) | |
| v. | ) | |
| | ) | |
| **PATRICK BRUCE GORDON,** | ) | |
| | ) | |
| Defendant and Appellant. | ) | |
| | ) | |

AUTOMATIC APPEAL FROM THE SUPERIOR
COURT OF SACRAMENTO COUNTY

Honorable Carol Miller, Judge

# DECLARATION AND REQUEST TO FILE SUPPLEMENTAL BRIEF; SUPPLEMENTAL BRIEF

FERN M. LAETHAM
State Public Defender

DEE HAYASHI
Deputy State Public Defender

MICHAEL TANAKA
Deputy State Public Defender
107 South Broadway, Ste. 9111
Los Angeles, CA 90012
Telephone: (213) 620-5402
Attorneys for Appellant

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

| | | |
|---|---|---|
| **THE PEOPLE OF THE STATE OF CALIFORNIA,** | ) | C004684 |
| | ) | |
| Plaintiff and Appellant, | ) | Crim. No. 24551 |
| | ) | |
| v. | ) | |
| | ) | |
| **PATRICK BRUCE GORDON,** | ) | |
| | ) | |
| Defendant and Appellant. | ) | |
| | ) | |

**DECLARATION AND REQUEST TO FILE SUPPLEMENTAL BRIEF**

Michael Tanaka declares under penalty of perjury as follows:

I am a Deputy State Public Defender currently assigned to represent appellant on his automatic appeal to this Court. The opening brief was filed on March 23, 1988, almost two years ago. In that time period there have been numerous cases decided by this Court and the federal courts. Some of these cases revealed the existence of issues not previously briefed. My review of the record in preparation for oral argument and for filing a petition for writ of habeas corpus also revealed the existence of issues not previously briefed. I believe that presentation of these issues to this Court is

necessary in order to accord appellant his right to the effective assistance of appellate counsel. (See In re Smith (1970) 3 Cal.3d 192.)

WHEREFORE, declarant respectfully requests leave of this Court to file the supplemental brief which follows.

Executed at Los Angeles, California, this 12th day of March, 1990.

MICHAEL TANAKA
Deputy State Public Defender

## APPENDIX "G"

**(Exhibit XX of the "Amended Petition and/or Second Supplemental Pleading, Pleading to Petition for Writ of Mandamus and/or Prohibition filed September 19, 1994, and Request for Stay of Order" in *Calderon v. District Court (Gordon)* (No. 94-70565))**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---

| | |
|---|---|
| PATRICK BRUCE GORDON, | Case No. CIV S-91-0822LKK |
| Plaintiff, | Sacramento, California<br>Wed., September 28, 1994 |
| vs. | |
| DANIEL VASQUEZ, et al., | Motion to Vacate Stay and for Authorization of Fees and Expenses. |
| Defendants. | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PETER A. NOWINSKI
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: JAMES KIRBY
Seigel & Kirby
770 L Street, Ste. 1140
Sacramento, CA 95814
(916) 441-0828

For Defendants: WARD CAMPBELL
Deputy Attorney General
1515 K Street, Ste. 511
Sacramento, CA 95814
(916) 324-5248

Court Recorder: LAURA CERDA
U.S. District Court- 650 Capitol Mall
Sacramento, CA 95814
(916) 551-2165

Transcription Service: V/ARS, Inc.
2001 H Street
Sacramento, CA 95814
(916) 448-2457

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

**SACRAMENTO, CALIFORNIA, WEDNESDAY, SEPTEMBER 28, 1994**

(Call to order of the Court.)

THE CLERK: Good morning, You Honor. Ward Campbell for the respondents.

THE COURT: Good morning, Mr. Campbell.

MR. KIRBY: Good morning, Your Honor. James Kirby, Seigel & Kirby for the petitioner.

THE COURT: Good morning Mr. Kirby.

Before we proceed, may I see both counsel?

(Off the record discussion)

THE COURT: Let the record reflect that in the matter of Gordon vs. Vasquez, all counsel are present in the courtroom.

I've had a lengthy discussion off the record with counsel for the parties in which counsel for the California Appellate Project has been present and participated. I've announced that it's my intent to vacate the -- or recommend to Judge Carlton that he vacate the order made quite some time ago in this case, staying the federal proceeding to allow petitioner to exhaust claims never before presented to the California court.

Also staying execution of the death sentence indefinitely while this action is proceeding, allowing a application for investigation, expenses, and the like under 21 USC Section 848(q) to be made and decided. Also, to allow the parties to conduct discovery all within the federal proceeding.

Schedule the matter for a status conference in approximately 120 days with the expectation that all necessary factual development will have been completed by that time, and at that point, look anew at the question, if there is one, whether any claims that petitioner wishes this Court to consider have been or have not been presented to the California court, and if it's appropriate, then allow exhaustion on a fully developed record, and proceed from there.

Mr. Campbell, on behalf of Respondent Vasquez has requested -- oh, let me add that that disposition then would moot the two pending requests before the Court in that because there was a federal proceeding pending, there'd be no question about the Court's jurisdiction, or the appropriateness of an order staying execution of the state death sentence pending the federal proceeding.

And second, because the -- any expenditure of monies authorized under 848(q) would occur under the supervision of the federal court during the pendency of federal habeas corpus action. There would be no arguable injury by way of insult to comity to the state court, and the state's pending writ application in the Ninth Circuit would be mooted.

Mr. Campbell has requested the opportunity to confer with others in the Attorney General's office before simply stipulating to such an order or recommendation because the matters are ones of importance to the Attorney General and certainly will recur in other cases.

Mr. Kirby has recognized that that's a fair request. If there is no objection by the Attorney General, Mr. Kirby and Mr. Campbell will cooperate in preparing an order memorializing our discussions. If there is disagreement by the Attorney General's office that Mr. Kirby cannot stipulate to an accommodation of -- the parties will advise the Court, I will prepare an order, and any offended party may take their objections to Judge Carlton.

Mr. Campbell, is that a fair synopsis of our discussion?

MR. CAMPBELL: Yes, it is Your Honor. I appreciate the opportunity to go back and reflect on whether or not there's any potential pitfalls for us that we want to think about, and we'll do it as expeditiously as possible.

Is there a possibility that we could get a transcript of how you've memorialized this agreement?

THE COURT: Certainly. Is there anything you want to add or subtract from that summary, Mr. Kirby?

MR. KIRBY: Your Honor, I think the summary is accurate. I do want to note for the record that Mr. Gordon's continuing objection to the Attorney General even being aware that we applied for funds, and obviously, that objection applies doubly to any disclosure, which I don't think there has been, of the content of that application.

Our position is that 848(q) gives us an absolute right to maintain the fact of an application itself in

confidence. What has happened before in this case has happened, but from here on out, our position is, and has been before that the fact that we have applied for funds is confidential under 848(q).

THE COURT: All right. I think that certainly the content of any application is confidential. I think Judge Carlton's publication of his order on my recommendation that the fact of an application isn't confidential is law of the case.

All right. Anything else, Mr. Campbell?

MR. CAMPBELL: No, nothing else at this time, Your Honor.

THE COURT: Mr. Kirby?

MR. KIRBY: That's fine, Your Honor. Thank you.

THE COURT: All right. Court's adjourned.

(Whereupon the hearing in the above-entitled matter was adjourned.)

## CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ September 28, 1994

Patricia A. Petrilla,
Transcriber